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PRINCIPLES

AND

PRECEDENTS

OF

HINDU LAW,

BEING

A COMPILATION OF PRIMARY RULES

RELATIVE TO

THE DOCTRINE OF INHERITANCE, CONTRACTS, AND MISCELLANEOUS SUBJECTS;

AND

A SELECTION OF LEGAL OPINIONS

INVOLVING THOSE POINTS,

DELIVERED IN

THE SEVERAL COURTS OF JUDICATURE

SUBORDINATE TO THE PRESIDENCY OF FORT WILLIAM,

TOGETHER WITH

NOTES ILLUSTRATIVE AND EXPLANATORY, AND PRELIMINARY REMARKS.

BY

W. H. MACNAGHTEN, ESQ.,

Bengal Civil Service.

THIRD EDITION.

TWO VOLUMES IN ONE.

Madras:

HIGGINBOTHAM AND CO.

1874.

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PUBLISHER'S PREFACE.

THIS valuable treatise on Hindu Law is a standard authority in all Civil Courts. It was indicted, as explained in the Author's "Preliminary Remarks," for the purpose not only of stating the Law in its varieties and furnishing a collection of precedents, but of fixing doubtful points, regarding which a contrariety of opinion had prevailed; and relates to Inheritance, Partition, Marriage, Adoption, Contracts and other minor subjects.

The work has been out of print for many years, and to meet the demand for books of this description, I have reprinted it as a companion volume to COLEBROOKE'S Digest. It was first published in 1829, and although thirty-five years have since elapsed, it loses none of its worth by being reproduced, at the present day, from the original edition. Few changes have, during this period, been introduced into this branch of Jurisprudence by the Legislature, and these few affect a very small portion of the work.

At the suggestion of gentlemen competent to form an opinion on the subject, I have not re-printed the second volume. This volume contains merely a selection from the dicta of the Hindu Law Officers attached to the several Courts of Judicature subordinate to the Bengal Presidency on questions proposed to them by the Judges of those Courts, and is not likely to be generally consulted; while the first is based on the principles enunciated in the second and comprehends all that is essentially necessary to Judge and Practitioner.

In typograhical execution, the present edition is much superior to the previous one, and it forms a compact and handy volume, which may, without inconvenience, be carried about for ready reference.

February 1865. *Publisher.*

PREFACE TO THE THIRD EDITION.

THE second edition of this standard Oriental Law work having been exhausted, the Publishers have much pleasure in issuing a *third*. In this impression, however, it has been thought advisable to include the volume of Precedents which was omitted in the last. The Publishers trust, that in its present form, it will be found more acceptable by the public.

March 1874. *The Publishers.*

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MEMOIR.

MACNAGHTEN, Sir WILLIAM HAY, the second son of Sir Francis Macnaghten, for many years a Supreme Court Judge at Calcutta, was born in August 1793. He came to India as a Cavalry Cadet on the Madras Establishment, in September 1809, and did duty with the Body Guard of the Governor of Madras, with whose family he continued to reside for some months. From the very beginning of his Indian career his mind was eagerly bent upon the pursuit of Oriental literature, and so the leisure hours of his easy appointment were devoted to the study of Hindustani and Persian. In May 1811, he obtained a prize of 500 Pagodas, (£175) for passing a successful examination in Hindustani. There was no reward appointed at that time for the study of Persian, but the Political Department holding out bright hopes for junior officers, Macnaghten was one of the number who aspired to enter it, with which object in view, he studied and passed a most satisfactory examination in Persian. Soon after, he was appointed to a Cornetcy in the 4th Cavalry, stationed at Hyderabad, where he remained a year, during which time having opportunities of visiting the Nizam, in company with the Resident, Mr. Henry Russell, he eagerly became acquainted with the policy and feelings of Native Courts. About a twelvemonth after, Government held out a prize of 500 Pagodas for eminent proficiency in Persian, when Macnaghten passed a second examination in it and secured the reward. He had in the meantime made considerable progress in Tamil and Teloogoo. About the middle of 1813, he accompanied the escort of Mr. Cole, Resident of Mysore, in which country he took the opportunity of gaining a knowledge of Canarese and Mahrattah.

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He was at this time employed by Mr. Cole, as Political Assistant, though not formally recognized as such by Government.

In 1814, Macnaghten was appointed to the Bengal Civil Service, and arrived at Calcutta in October, with most flattering testimonials from the Governor of Madras and the Resident of Mysore. In the College of Fort William, he applied himself with greater ardour than ever to the study of Oriental literature, and on the sixteenth anniversary of the Institution, Lord Hastings, in noticing Macnaghten's exertions, stated, that "there was not a language taught in the College in which he had not earned the highest distinctions which the Government or the College could bestow." In May 1816, he was appointed Assistant to the Registrar in the Sudder Dewanny Adawlut, the highest Court of Appeal in the Presidency; in November 1818, he was deputed to officiate as Joint-Magistrate of Malda. In February 1820, he was appointed Judge and Magistrate of Shahabad. In January 1822, he returned to Calcutta as Deputy Registrar of the Sudder Court, when he requested that a Committee might be appointed to examine him in Hindoo and Mahomedan Law; this was granted and the report of the Committee spoke in the warmest terms of the extraordinary proficiency he had evinced during a very searching examination. The Marquis of Hastings, in his last address at the College of Fort William, said, "For these distinctions a successful candidate has recently presented himself and enrolled a name already honorably familiar in the Annals, and associated with the best eras and efforts of the Institution. Mr. William Macnaghten has shown in his bright example, and even amidst the engrossing duties of public station, that industry can command the leisure, and genius confer the power, to explore the highest regions of Oriental literature and to unravel the intricacies of Oriental law. The Committee of Examination appointed to report on that gentleman's proficiency in the study of Mahomedan and Hindoo Law, have expressed a very high opinion of his attainments, and have pronounced him eminently qualified to consult, in the original, any work on the subject. It is time, indeed, that his labours have been prosecuted beyond the walls of this Institution; but within them was the foundation laid on which Mr. Macnaghten has reared so noble a superstructure." On the 5th September 1822, within

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a fortnight of this commendation, he was gazetted as Registrar of the Sudder Dewanny, which appointment he held for eight and a half years, and during that period in addition to the daily labours of the Court, he carried through the press three volumes of the Reports of Decided Cases, more than two-thirds of which were reported by himself. They are of standard authority on all legal questions to which they refer, and enjoy the same reputation in Indian Courts as the most esteemed and authentic reports do in English Courts. Two other works also emanated from his pen during this time, "Considerations on Hindoo Law" and "The Principles and Precedents of Mahommedan Law;" the latter is now in its fourth edition. At the close of 1830, Lord William Bentinck determined to make a tour through the Upper and Western Provinces of India, to look into many questions of great interest and importance relative to the revenue, the police and judicial systems, and more particularly to expedite the survey and settlement of the North-western Provinces. He chose as his Secretary to accompany him, Macnaghten, and from this date his political career may be said to have commenced. He was present at the meeting of his Lordship with Runjeet Sing at Roopur, where he obtained his first insight into the mysteries of Lahore policy, and on his return to the Presidency at the beginning of 1833, he was entrusted with the Secret and Political Departments, a post he continued to occupy for four years.

Lord Auckland succeeded to the Government of India in 1836, and in October of the following year, proceeded on a tour to the North-west Provinces, taking with him as his predecessor had done, Macnaghten. From Simla, Macnaghten was sent on a mission to Runjeet Sing and Shah Sujah, the object of which was to depose Dost Mahommed and re-instate Shah Sujah on the throne of Cabool, the expedition being assisted by contributions of money, the presence of an envoy and a sufficient body of officers to discipline and command the troops, by the English Government. Macnaghten returned with the tripartite treaty to Simla on the 17th of July 1838, and found that during his absence there had been a further development of the expeditionary project. It had been decided that a British army should cross the Indus and plant itself in the centre of Afghanistan. In November the army of the Indus as it

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was called, assembled at Ferozepore, on the banks of the Sutlej and Macnaghten accompanied it, as envoy and Minister at the Court of Shah Sujah. Ere the army marched, news arrived that the siege of Herat had been raised and as there was no necessity to proceed thither, its strength was reduced by one-half. A more delicate or difficult office had never been before conferred on a subordinate functionary, such as Macnaghten was now appointed to. There was a long and dreary march before the army, through mountain defiles and sandy deserts, into an unknown country. He accompanied a prince, who was very unpopular, and a prince, who, even if restored to the throne of his ancestors, could only retain it by the gleam of British bayonets and gold. The diplomatic arrangements were placed in one hand and the military in another, the sad sequel of which will be related further on.

Military history has told with what brilliant success this enterprise opened, and how disastrously it ended, but it is Macnaghten's conduct throughout it, in his difficult and responsible post that this memoir must deal with. Candahar was taken, Ghuzní, Mahmood's celebrated fortress was captured, and Cabool, the key to India was occupied (2nd August 1839), and Shah Sujah installed in the Bala Hissar on the 7th August 1839. Half the forces were sent back to India. Honors were showered on Lord Auckland, Sir John Keane, Macnaghten, Pottinger, Willshire and Wade. Macnaghten was created a Baronet. Dost Mahommed surrendered on the 3rd November 1840, by riding up to Macnaghten and giving him his sword and claiming his protection. The next course the Government adopted, was retrenchment. The stipends allowed to the Afghan chiefs for relinquishing the immemorial practice of levying contributions on the highways in their respective districts were reduced. These stipends were guaranteed to them on our entering the country, and they had performed their portion of the contract with exemplary fidelity. Now they all rebelled, pillaged, plundered convoys of every description and blocked up the passes—in fact the whole country was soon in a blaze of rebellion. Macnaghten had been rewarded for his services by the Governorship of Bombay and was making preparations to leave in November 1841, but while all seemed calm and unruffled on the surface of the Afghan race, a general confederacy was being organized

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for the expulsion of the British. Information of this movement poured in from all sides, but the envoy indulged in a false security, and believed it was a mere local *émeute* which might easily be suppressed, and not a national revolt. On the 1st of November Sir Alexander Burnes called on Macnaghten whom he was to succeed in his Political appointment, and congratulated him on leaving Afghanistan in a state of profound tranquillity. On the following day Sir Alexander Burnes was assassinated! The adjoining house, Captain Johnson's, the Paymaster of the Shah's forces, was next attacked and plundered of Rs. 170,000, (£17,000). The insurgents were scarcely a hundred in number at this time, while a British force of 5,000 men was lying idle within a mile and a quarter of the spot, and yet no active measures were taken to nip the revolt in the bud. The General-in-Chief was General Elphinstone, a gallant old Officer, but weighed down by physical infirmities, who had been pitchforked into this post by Lord Auckland, contrary to the advice of Sir Jasper Nicholls, the Commander-in-Chief. The envoy had received a note at seven on the morning of the 2nd November from Sir Alexander Burnes; he instantly called on the General, but made light of the *émeute*, and the General was only too glad to acquiesce in his views. The procrastination and inactivity of the authorities encouraged the small band of insurgents and swelled their ranks to immense numbers, and after a succession of military blunders, Macnaghten was informed that the only course left open to him was negotiation. Akbar Khan, one of the sons of Dost Mahommed, next arrived upon the scene, and was at once accepted as the leader of the national confederacy. Cut off from supplies by the energetic measures of this fiery and impetuous young man, starvation stared the garrison in the face, and on the 11th December when only sufficient food was left for one day's consumption, the envoy was compelled to negotiate. A conference was held, the salient points of which were "that the British troops at Candahar and Cabool, at Ghuzní and Jellalabad, should evacuate the country, receiving every possible assistance in carriage and provisions, and that Dost Mahommed and his family should be set at liberty. Shah Sujah was to be allowed the option of remaining in Afghanistan with a pension of a lac of Rupees a year, (£10,000) or of accompanying the British troops to India. The army was to quit the cantonments within three days, and in the meantime to receive ample supplies of provisions,

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for which due payment was to be made, and four officers were to be delivered up as hostages for the performance of the stipulations."

Macnaghten's own explanation of this disgraceful transaction, is this:

"The whole country as far as we could learn had risen in rebellion; our communications on all sides were cut off; we had been fighting forty days against superior numbers under most disadvantageous circumstances with a deplorable loss of life, and in a day or two must have perished of hunger. I had been repeatedly apprized by the military authorities that nothing could be done with our troops. The terms I secured were the best obtainable, and the destruction of 15,000 beings would little have benefited our country, while the Government would have been almost compelled to avenge our fate at whatever cost." The historian of the Afghan war describes the position of the envoy thus, "Environed and hemmed in by difficulties and dangers, overwhelmed with responsibility which there was none to share—the lives of 15,000 men resting on his decision—the honor of his country at stake—with a perfidious enemy before him, a decrepit General at his side, and a paralyzed army at his back, he was driven to negotiate by the imbecility of his companions." There is no doubt that the entire blame rests with the two military commanders, who were quite unfitted for their posts, General Elphinstone, by bodily infirmity and constitutional imbecility, and Brigadier Shelton, by a perverse temper and obstinacy.

The treaty made with the Afghans was violated by them. The aid offered was refused, though the envoy had fulfilled his part of the contract to the letter—and he was drawn into a mesh which resulted in his death, thus related in Marshman's History of India, "It was at this critical juncture, while Sir William Macnaghten was tossed upon a sea of difficulties and bewildered by the appalling crisis, which was approaching, that he was drawn into the net which Akbar Khan spread for his destruction. On the evening of the 22nd December 1841, the wily Afghan sent two Agents with Major Skinner, who was his prisoner, to the envoy, with a proposal, to be considered at a conference the next day, that Akbar Khan and the Ghilzyes should unite

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with the British troops outside the cantonment, and make a sudden attack on Mahomed Shah's fort and seize the person of Ameenoolla, the most hostile and ferocious of the insurgent chiefs, whose head was to be presented to the envoy for a sum of money, but the offer was indignantly rejected by him. It was further proposed that the British force should remain till the spring: and then retire of its own accord; that the Shah should retain the title of king, and that Akbar Khan, should be Vizier receiving from the British Government an annuity of four lacs of Rupees a year, and an immediate payment of thirty lacs. In an evil hour for his reputation and his safety, the envoy accepted this treacherous proposal in a Persian paper drawn up with his own hand. When this wild overture was communicated to General Elphinstone and Captain Mackenzie the next morning, they both pronounced it to be a plot, and endeavoured to dissuade Sir William from going out to meet Akbar Khan. He replied in a hurried manner, "Let me alone for that, dangerous though it be; if it succeeds, it is worth all risks; the rebels have not fulfilled one article of the treaty, and I have no confidence in them, and if by it we can only save our honor, all will be well. At any rate, I would rather suffer a hundred deaths than live the last six weeks over again." At noon he directed the General to have two regiments, and some guns ready for the attack of the fort, and then proceeded with Captains Trevor, Mackenzie and Lawrence, with the slender protection of only sixteen of his bodyguard to the fatal meeting. At the distance of six hundred yards from the cantonment, Akbar Khan had caused some horse cloths to be spread on the slope of a hill, where the snow lay less deep. The suspicions of the officers, as they dismounted, were roused by the appearance of Ameenoolla's brother at the conference, and the large number of armed followers who were present. Akbar Khan addressed a haughty salutation to Sir William, and immediately after, on a given signal, the officers were suddenly seized from behind, and placed separately on the saddle of an Afghan horseman, who galloped off to the city. Captain Trevor fell off the horse, and was hacked to pieces. Akbar Khan himself endeavoured to seize Sir William, who struggled vigorously, exclaiming in Persian, 'For God's sake.' Exasperated by this resistance, the fierce youth drew forth the pistol which Sir William had presented to him the day before and shot him dead, when the *ghazees* rushed up, and mutilated

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his body with their knives. If his own repeated declaration be worthy of any credit, Akbar Khan had no intention of taking away the life of the envoy, but was simply anxious to obtain possession of his person as a hostage for the Dost. Thus perished Sir William Macnaghten, the victim of an unsound and unjust policy, but as noble and brave a gentleman as ever fell in the service of his country."—"*Men whom India has known.*"

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PRELIMINARY REMARKS.

So much has, of late years, been written on the subject of Hindu Law, that any addition to the information already communicated, may at first sight be regarded as altogether superfluous. In Bengal, there has been recently published a work entitled Considerations on Hindu Law as current in that province; besides which, the stock of reported Cases, involving questions connected with that law, has been very considerably augmented. In the publication called the Elements of Hindu Law, we find a sketch of the jurisprudence in question, conformably to the system in force at Madras, together with an Appendix, containing the replies of the Pundits, (or as they have been termed by the Compiler, the *responsa prudentum,*) with reference to cases actually brought under litigation in the several civil courts subordinate to that presidency; while the Reports of Cases decided in the Sudder Adawlut at Bombay, and a work published at the

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same presidency under the appellation of a Summary of Hindu Law, have afforded valuable information regarding the laws and customs of the Hindu population on that side of India. There still, however, remained a desideratum, which I have here endeavoured to supply. It still remained to state the Law, and its varieties as current throughout the extensive territories subject to the Presidency of Bengal, and to furnish a collection of precedents of points already determined, which might serve as a safe, because an uninterested, guide, to the correct decision of future and similar questions.

"If books and laws," observed Dean Swift, "continue to increase as they have done for fifty years past, I am in some concern for future ages, how any man will be learned, or any man a lawyer."* Such a complaint could not with justice be made of publications relating to the Hindu law, or of that law itself, to which there have been no modern additions, and our knowledge of which may be said to be as yet in its infancy. It is not likely that works on this sub-

* Thoughts on various Subjects.

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ject will ever attain to an overwhelming number. Few men have leisure to become acquainted with the law in an English dress, and still fewer to study it in the original. The civil functionaries of this country, from the first moment of their entry into public life, for the most part find their time and attention so completely absorbed in the discharge of their indispensable and current official duties, as to render it hopeless for them to attempt to acquire a knowledge of those laws which they are bound to administer. In such a state of things, it must be admitted, that any information which may be turned to account in practice, cannot but be eminently useful—nor does there appear to be any better method of solving judicial doubts, than by resorting to decisions already passed, the accuracy of which may generally be admitted, and the impartiality of which can never be denied.

It has been my object in this work, to fix doubtful points regarding which a contrariety of opinion has hitherto prevailed; and passages from the publications above alluded to have not unfrequently been cited in corroboration of the doctrines which I have adopted. Though I have satisfied myself, I am aware it by no means follows that

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others should be convinced with the same facility: but it is certainly true, that questions of the highest importance, and which are of every-day occurrence, should be finally determined in one way or another. The mode is nothing:—the determination is everything. It matters little, for instance, to the community at large, whether a father shall be held to have the right of conferring his ancestral real property on one son, to the exclusion of the rest; but it is of the highest importance to every member of the community, that the rights and privileges of each should, as far as practicable, be defined and established.

I apprehend that the Hindu law, in its pure and original state, does not furnish many instances of uncertainty or confusion. The speculations of commentators have done much to unsettle it, and the venality of the Pundits has done more. It was remarked by Paley, that "after all the certainty and rest that can be given to points of law, either by the interposition of the legislature or the authority of precedents, one principal source of disputations, and into which indeed the greater part of legal controversies may be resolved, will remain still, namely, the competition of opposite analo-

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gies."* But this source of uncertainty should not exist in the system here treated of. The Pundits are called upon, not in the character of advocates to urge different analogies, but as faithful expositors of existing written law with relation to simple facts distinctly stated. There is not any contention of the bar in such matters, and there ought not to be the exercise of any ingenuity. It may seem harsh and unjust to pass an indiscriminate censure upon any body of men: but while I admit, that there are not wanting among them individuals of unimpeachable honesty and profound erudition, I am still of opinion, that to the Pundits is chiefly attributable the perplexity of the system which it is their province to expound. The difficulty of detection is tempting; and, where the law is perverted, the perversion is seldom so glaring as to admit of exposure by superficial inquiry. Authorities are frequently cited in support of a particular doctrine, which are indeed genuine passages of law, but applicable to a question wholly different from the subject-matter. Again, authorities may be cited, which are both genuine and applicable to the identical subject treated of, but which are of no weight in the particular

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* Moral Philosophy, Book VI, Chap. 8.

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province whose doctrine should have been adopted. Further facility for evasion is gained by the confusion between natural and civil obligations. This is the case in the Hindu law, especially as it obtains in the province of Bengal. It by no means follows, that because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible. That this should be the case, in a system containing so much of ethical ingredients, is not to be wondered at; but the principle of legalizing a breach of positive prohibitions, has been carried much further than could have been contemplated by the legislator. Every man is declared to be master of his own acquisitions. This is a maxim of law: but in the distribution of it, he should not shew an undue preference to any individual member of his family. This is a precept of morality. By infringing the latter, the force of the former is not destroyed: consequently the undue preference in this case is not repugnant to law. But, on the other hand, a father and son have equal right to ancestral real property. This also is a maxim of law: and if an undue preference be shewn in the disposition of this species of property, such act is not only at variance with the moral precept,

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but is repugnant to the positive law. It has nevertheless been contended, as will be more fully shewn in the body of this work, that such act, if done, must be considered as legal to all intents and purposes. This question has been discussed at some length in the present compilation : and though it is not to be expected that the conclusions I have formed in this and other instances should be considered as infallible guides, yet the grounds whereon they rest have been severally given, which may tend to shew whether they should be acquiesced in or rejected. I may however be permitted to add, that these conclusions have not been arrived at without consulting books, and having recourse to the best available living authorities.

By Section 15, Regulation IV, 1793, re-enacted for Benares and the Upper Provinces by Regulation VIII of 1795, § 3, and Regulation III of 1803, § 16, it is provided, that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Hindu laws with regard to Hindus, are to be considered as the general rules by which the judges are to form their decisions. Questions connected with the two first-mentioned points are frequently litigated in the

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established courts, while those originating in the last-mentioned sources of contention are for the most part adjusted by reference to private arbitration. These subjects have, therefore, been but slightly adverted to in the following pages, designed as the work is solely for the purpose of practical utility. The provision in the enactments above cited would appear to exclude cases of contract, evidence, and other miscellaneous matters; but there may be questions incidentally involving these topics, and they may be so interwoven with cases which it is the duty of the courts to decide agreeably to the Hindu law, that attention to the principles of the one may be essential to the due adjudication of the other. For instance, in a claim of inheritance, the defendant may plead a title by purchase, and the question will then arise as to how far the ancestor was at liberty to contract. So also in a case of disputed marriage, it may be a question as to how far the witnesses adduced in support of its validity may be considered competent or otherwise. This will involve some consideration of the law of evidence.

Ancient laws, pronounced to be obsolete in the present age, I have purposely omitted the mention

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of; such as the doctrines relative to the various descriptions of subsidiary sons, and those respecting the rights of sons by mothers of different classes, only three kinds of adoption being permitted or practised in the present age, and marriage with females of a different tribe being prohibited. The subjects discussed in this work are those of Inheritance, Partition, Marriage, Adoption, Minority, Slavery, Contracts (including Debt, Gift, and Sale), and Judicial Proceedings, being a translation of an extract from the *Vyavahárramátricá Prukurn* of the *Mitácshará*, including the Law of Evidence and Pleading. A considerable portion of this, especially the chapter on Ordeals, might perhaps have been omitted without material detriment to the utility of the work; but I was induced to add it for the gratification of curiosity, no entire version having yet been made, to my knowledge, of this topic of *Hindu* jurisprudence. On their Law of Bailments I have not deemed it necessary to touch, as that subject has been amply discussed in the Digest translated by Mr. Colebrooke, and epitomes of the same are contained in the Considerations on the Hindu Law as current in Bengal, as well as in the work entitled "Elements of Hindu Law."

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It will be conceded, I imagine, that the rules affecting succession are clear, simple, and copious; that provision is made for almost every case that can possibly arise; and, making allowance for the different opinions which prevail in the different schools, and for a few disagreements among authors of the same school on points of minor importance, that there can be but little room for hesitation, when a question respecting inheritance is litigated, and little reason to apprehend that an erroneous conclusion may be arrived at. In all codes, however, there must be some omissions which can only be supplied by analogy. From this defect the Hindu law cannot be expected to be altogether exempt. Where such cases occur, they doubtless furnish ample food for ingenuity; though in the course of my experience, I have met with but few instances of the kind, and still fewer in which there could be any legitimate or reasonable ground to doubt as to which side of the argument the preference should be assigned. I will illustrate my meaning by mentioning a case in point, in which, though there is more to be said on both sides than in most others of a similar nature, there can be but little doubt as to the doctrine which should be preferred. A man dies childless, leaving three widows him surviving.

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He gives permission to one of them to adopt a son after his death, which is done accordingly. The adopted son dies, also childless, leaving the three widows aforesaid him surviving. Now the question is, to whom, on the death of such adopted son, will the property go? Should it be taken entirely by the widow who made the adoption, or should it be divided equally among the three widows? The law is silent as to this particular case; and those who contend that the property should be taken by the single widow, do so on the ground that although, had there been no adoption, the three widows would have been entitled to equal shares, and although, had the childless husband adopted the boy during his lifetime, he could not have selected for him as adopting mother one of his three wives and excluded the others from all maternal relation, yet that a boy having been adopted after the death of the husband, the estate to which he succeeded belongs of right to the widow who received him in adoption, to the exclusion of the other two, who can be considered in the light of step-mothers only. This reason seems plausible enough, but it is not the law. The three widows of the same man are held to be, in a legal point of view, one and the same individual. The widow to

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whom the permission was given may indeed have the privilege of selecting the boy to be adopted; but the adoption being once made, he necessarily holds the same relation to all the three widows of his adopting father. I here merely allude to the rights and privileges accruing to the single widow from the simple fact of her having made the adoption, independently of any intention expressed or implied by the deceased, that such widow alone should be considered as the mother of the adopted child. If he declared this explicitly, the case would be different; or if such may be reasonably gathered to have been his intention, from some unequivocal indication of his will that his other wives should have no concern with the adoption. But the simple tact of his having commissioned any one of the three to select the boy, cannot be considered as sufficient to deprive the two others of their maternal rights, or to debar them from taking the shares to which they would have succeeded had no adoption taken place. Another case in point is that of a man dying survived by three widows, who take his property and divide it among themselves, each taking a third. On the death of one of them, who is entitled to succeed to her property, the other widows, or the heirs male of her husband? The

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law is silent as to this point also. It is true that the law ordains the succession of the husband's heirs after the widow; but this rule does not contemplate the existence of other widows, and the weight of it is counterbalanced by another, which prescribes that the widow shall take the entire property, to the exclusion of the heirs of the husband; and, consequently, on the death of the first widow, the second and third take the share of which she died possessed, and, on the death of the second, the entire property will devolve on the third; nor have the husband's heirs any legal claim until after her death. This proceeds upon the principle abovementioned, that all the three widows of the same man are held to be, in a legal point of view, one and the same individual. Cases of this description might here be infinitely multiplied, but the foregoing will suffice for the present.

The Hindu law of partition contains one anomaly, which would at first sight appear unjust and absurd. I allude to that rule which entitles an idle brother to claim a share of the acquisitions of his industrious brethren,—the drone to participate in the labours of the hive. But when the peculiar constitution of the Hindu society is considered,

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this provision will not be found to be altogether repugnant to justice or to reason. No respectable Hindu would travel in quest of employment without providing sufficient protection for the females of his family; and the individual usually selected for this purpose is one of the brethren, who resides without any active employment in the family house, while the rest go in quest of service, and not unfrequently amass immense wealth, while the brother left behind has not advanced one step from his original state of poverty. But it would be hard to deny him a share of the good fortune which had attended his brethren, since it is evident, that unless some one had performed the part he undertook, they could not have acquired the wealth; and he may, therefore, be fairly held to have contributed his aid towards the acquisition. It might also be affirmed, that had he engaged in a more active occupation, the same success would also have attended his endeavours. Where the patrimony has been used (however slight the use of it may have been) in making the acquisition, an idle brother, though not engaged in domestic duties, is entitled to participate likewise; but even in this provision there is reason. It could not be affirmed with certainty, that the same sum extracted

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from the original stock might not have been turned to so good an account by him who had not, as by him who had expended it. The sum so expended was the root and origin of the subsequent acquisition; and, as to its amount, it would obviously be impracticable to define what should, and what should not be considered to constitute the use of the patrimony.

Questions connected with the connubial state are, as I before observed, but rarely brought into the courts of judicature under this presidency. I have, therefore, refrained from expatiating on the subject. It can but rarely, if at all, in any of its bearings, form a topic of legal controversy. To those who are desirous of more full and particular information relative to this branch of Hindu economy, the labours of Ward may safely be recommended, as combining minuteness with accuracy in an eminent degree.

The law regarding adoption is deserving of the most serious and attentive consideration, as there is perhaps no topic of Hindu jurisprudence more surrounded by doubts and difficulties. Some of these I have endeavoured to clear up and remove; and if I

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have betrayed too much confidence in the attempt, I can only plead in excuse, that to speak dubiously where I had brought my own mind to conviction, would have defeated the object I had in view. Reduction to certainty, or to a point as nearly approaching to it as practicable in the absence of positive demonstration, was that object; but it will be for others to judge, having the evidence and the conclusion before them, whether the latter is consistent with the former. In all essential matters, it will be seen that the law of adoption among the Hindus assimilates closely to that which prevailed among the Athenians and the Romans. The points regarding which, in modern practice, the greatest disagreement has been evinced, are those relative to the proper age for adoption, the succession of the son adopted to the property of his adopting father's collateral relations, and the legality or otherwise of two successive adoptions.

In the case of minors, the Hindu legislature does not appear to have made any express provision against the rapacity of those interested in outliving them; but it was probably considered, that by constituting the sovereign power the legal guardian of all infants, and by declaring them exempt from lia-

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bility of whatever description, *durante minoritate,* sufficient safeguards had been established; that by the first would have been secured wisdom and caution in the selection of an immediate protector for the person and property of the minor; and that by the second all pretence for the invasion of his interests would be removed.

I have not thought it requisite to discuss at much length the doctrine of slavery among the Hindus: but since hazarding a few observations on that topic, I have looked into Puffendorf's Disquisition on despotical Power,* and find that he traces the origin of all servitude to contract. He observes, that "in the early ages of the world, when men began to quit their primitive plainness and simplicity, to cultivate the method of living, and to enlarge their fortunes and possessions, it is very likely the wiser and richer sort invited those of less parts and less wealth, to assist them in their business for hire. Afterwards, when both parties found their benefit in this way of proceeding, the meaner tribes were by degrees persuaded to join themselves perpetual members to the families of the greater," &c. He

* Book vi, Ch. 3.

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then proceeds to argue, that "the convenience of discharging inferior offices and labours by the hands of others being thus found out, in succeeding times, when wars grew pregnant in the world, it passed by degrees into a custom, to indulge captives with life and corporal liberty, upon condition that they should yield perpetual service to the conqueror." In this respect the learned jurist (as he himself admits) differs from many other high authorities; but it matters little whether slavery had its origin in war or in peace. We know, at all events, that in proportion to the progress of the arts of peace, the evils of war are mitigated, and that it is only among the most uncivilized nations of the present day that success in war is considered as a just reason for making slaves of the captives.

Contracts are not required by the Regulations to be interpreted conformably to the principles of Hindu law, though it must occasionally so happen that a reference to this branch of jurisprudence will be found necessary for the adjustment of a dispute connected with the law of inheritance. In the chapter on minority, allusion is made to a case illustrative of this fact. In the case adverted to, the mother of a minor had sold his paternal landed property, with

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a view to liquidate a debt which had been contracted by his father. On suit to set aside the sale, and to recover the estate in virtue of the right of inheritance, it became necessary to determine, in the first instance, how far the widow was competent to contract, under all the circumstances of the transaction; and the determination of this question obviously depended on the law by which the transferred estate was governed. The necessity of conforming to the Hindu law of contracts, had it been enjoined as the rule of decision in all their dealings, would not, perhaps, have furnished just cause of regret. The Supreme Court is required to administer justice to the Hindus in matters of contract agreeably to their laws and usages; and it has been remarked by one of the Judges of that Court,* who had devoted no small portion of his time to the study of their code, and who was not by any means disposed to view it generally in a favourable light, that "if a prevalence of common sense is to be discovered in the laws of the Hindus, it must be sought for in that portion of them, containing the precepts by which dealings between one man and another are to be regulated."

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* The author of the Considerations on Hindu Law as current in Bengal.

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Of the version from the *Mitácsharà* containing the Hindu doctrine relative to judicial proceedings, it remains to speak. Detached portions of this translation have already appeared in the work entitled, "Considerations on Hindu Law," but I deemed it advisable to present the whole to the European reader in a connected form on this occasion. It will readily be perceived, that the forms of administering civil justice were primitive, and compendious enough. Perspicuity and precision are continually enjoined in the pleadings, and litigation appears to have been attended with no expense. We have no means of ascertaining whether the operation of the system was efficient, but it probably sufficed for a population to whom the distinctions and refinements of commerce were unknown, and who appear to have never advanced beyond a certain point of civilization. There must always be a close analogy between the state of a society and its laws. Where the one is neither artificial nor progressive, the other, as a natural consequence, will be simple and stationary. This is accordingly the case with the Hindus. For ages their national condition has undergone no change, and for ages their national code has continued undisturbed by reform or modification. The trial by ordeal, termed the *Divia Pru-*

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manum, which may be translated *Judicium Dei*, forms a very prominent part of the system; but in this the Hindus are by no means peculiar, the purgation by ordeal seeming, as remarked by Blackstone, to have been very ancient and very universal in the times of superstitious barbarity. Throughout the whole of the chapter on judicial proceedings, it would not be difficult to trace analogies between the Hindu, and more enlightened codes of jurisprudence; but I do not possess sufficient qualifications for the task, nor would the result be profitable, even were it well executed. I have, therefore, contented myself with noting such as obviously suggested themselves to me while engaged in the version of the original.

There may be said to exist in the present day five distinct schools of Hindu law, which differ more or less from each other. They may be termed the schools of Bengal, of Benares, of Mithilá, of the Ḍekhan, and of the Mahrattas. The original *Smritis* are of course common to all, but they each assign the preference to particular commentators and scholiasts. In Bengal, the works chiefly followed are the *Dáyabhága* of *Jimutaváhana*, the *Dáyatatwa* by *Raghunandana*, the *Vya-*

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*vahāratatwa** by the same author, the *Subodhini*, a commentary on the *Dáyabhága* by *Sricrishna Tarcálancára*, the commentary on the same by *Achárjya Chúdámáni*, the *Dáyacramasangraha* of *Sricrishna*, and the compilations termed the *Vyavasthárnava*, the *Vivádárnavasetu*, and the *Vivádabhangárnava*. In Benares, the preference is shewn to the *Mitácshará* of *Vijnyáneswara*, and its commentary by *Veereshwara Bhatta* and *Bálambhatta*; the *Veeramitrodaya* by *Mitramisra*; the *Parasurámádhava*, and the *Vyavahāramádhava*. In Mithilá, respect is paid chiefly to the following authorities:—the *Vivádachintámani* and *Vyavaha'rachinta'mani* by *Vachaspatimisra*, the *Viva'daratna'cara* by *Chandeswara*, the *Madanapa'rijata* by *Madanopadhya'ya*, the *Dwaitaparisishta* by *Keshaba Misra*, the *Smritisa'ra* and *Smritisamoochaya* by *Hurina'thopadhyáya*, and the *Vivádachandra* by *Misroo Misra*. The *Mitácshará*, the *Smritichandricá*, the *Mádhaviya*, and the *Suraswativilása* are the works of paramount authority in the territories dependant on the government of Madras;* while the authorities chiefly referred to on the Bombay side are, (besides the text books of *Menu* and *Yájnyawal-*

* See preface to Elem. Hin. Law, p. 14.

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cya,) the *Vyavaha'ramayúc'ha,* the *Nirnayasindhoo,* the *Hemadree,* the *Vyavaha'rakoustoobha,* and the *Parasurámádhava.** I do not mean to affirm that these are the only works of paramount importance recognized in the respective schools; but they are most frequently referred to; they are sufficient to solve the ordinary legal questions which arise; and suspicion may justly be excited, where an exposition of law is supported by citations from more recondite authorities. In questions relative to the law of adoption, the *Dattacamimánsa* and *Dattacachandricá* are equally respected all over India; and where they differ, the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithilá and Bénares.

The Precedents contained in the second volume have been selected from an enormous mass of crude materials. When it is mentioned, that I have examined every opinion that has been delivered in every court of judicature subordinate to the presidency of Bengal from the year 1811 up to the present day, it may be a matter of wonder, that the

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* See preface to Summary of Hindu Law, p. 5.

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selections are not more numerous and more valuable. But the task of rejection has been found very laborious; at least nine-tenths of the opinions were ascertained, on examination, to be erroneous, doubtful, unsupported by proof, or otherwise unfit for publication; while, in not a few instances, the nature of the case itself was involved in obscurity, from the circumstance of the reply alone being forthcoming; the whole record of the case having been made over to the law officer, with a view to enable him to find out, and report the law upon, the point or points at issue between the parties. The admitted opinions have been carefully examined; and they will, it is hoped, be in general found to have at least the merit of accuracy.

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CONTENTS

OF THE

FIRST VOLUME.

Page.

Preliminary Remarks.

CHAP. I. Of Proprietary Right, ... 1

„ II. Of Inheritance, ... 17

„ III. Of *Stridhun*, or Woman's separate Property, ... 37

„ IV. Of Partition, ... 43

„ V. Of Marriage, ... 57

„ VI. Of Adoption, ... 63

„ VII. Of Minority, ... 103

„ VIII. Of Slavery, ... 113

„ IX. Of Contracts, ... 121

A Translation of a portion of the *Mitácshará* from the original *Sanscrit*, ... 131

CHAP. I. On the Administration of Justice, ... 133

Sect. 1. Constitution of a Judicial Assembly, ... 133

Sect. 2. Subject of a Judicial Proceeding, ... 141

Sect. 3. Process of Citation, ... 144

Sect. 4. Of the Declaration, ... 147

Sect. 5. Of the Answer, ... 154

Sect. 6. Of the *Onus Probandi* and Judgment, ... 164

Sect. 7. Recapitulation, ... 166

CHAP. II.

Sect. 1. Of Retort or Recrimination, ... 169

Sect. 2. Of Mesne Process, ... 174

Sect. 3. Judgment in Actions for Debt, ... 175

Sect. 4. Special Rule regarding the Answer, ... 176

Digitized by Google

CHAP. II.
Sect. 5. Indications of Falsehood, ... 178
Sect. 6. Of Conflicting Claims, ... 180
Sect. 7. Of an Action attended by Wager, ... 182
Sect. 8. Special Rules of Proceeding, ... 183
CHAP. III.
Sect. 1. Of the General Nature of Evidence, ... 195
Sect. 2. Of Relative Priority, ... 199
Sect. 3. Of the Effect of Possession, ... 201
Sect. 4. Digression concerning Fines and other Penalties, ... 209
Sect. 5. Of Possession without Title, ... 212
Sect. 6. Of a Title without Possession, ... 217
CHAP. IV. Of Appeals and other Matters, ... 223
„ V. Digression concerning Trove and Plundered Property, ... 231
„ VI. Of Witnesses, ... 239
„ VII. Of Written Proof, ... 269
„ VIII.
Sect. 1. Of Evidence by Divine Test, ... 283
Sect. 2. Of the Ordeal by Balance, ... 298
Sect. 3. Of the Ordeal by Fire, ... 311
Sect. 4. Of the Ordeal by Water, ... 319
Sect. 5. Of the Ordeal by Poison, ... 327
Sect. 6. Of the Ordeal by sacred Libation, ... 332
Sect. 7. Of the Ordeal by Grains of Rice, ... 336
Sect. 8. Of the Ordeal by hot Metal, ... 338
Sect. 9. Of the Ordeal by *Dharma* and *Adharma*, ... 340
Sect. 10. Of other Tests, ... 341
Index, ... 345

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PRINCIPLES OF HINDU LAW,

BEING

A COMPILATION OF PRIMARY RULES

RELATIVE TO

THE DOCTRINE OF INHERITANCE, CONTRACTS,

AND MISCELLANEOUS SUBJECTS,

TOGETHER WITH

NOTES ILLUSTRATIVE AND EXPLANATORY,

AND

PRELIMINARY REMARKS.

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PRINCIPLES

OF

HINDU LAW.

CHAPTER I.

Of Proprietary Right.

PROPERTY, according to the Hindu law, is of four descriptions, real, personal, ancestral, and acquired. I use the terms real and personal in preference to the terms moveable and immoveable, because, although the latter words would furnish a more strict translation of the expressions in the original, yet the Hindu law classes amongst things immoveable, property which is of an opposite nature, such as slaves and corrodies, or assignments on land.* In a work of this kind, intended solely for the purpose of practical utility, it would be useless to attempt any inquiry as to the origin of the right of property according to the notions of the Hindus, or as to the nature of the tenures of real property in India. The various modes of acquisition, as occupancy, birth, gift, purchase, and the like, have been detailed and commented on with all the elaborate minuteness peculiar to the Hindu jurists.† It

Property is fourfold.

* *Jim. Va.* cited in Dig., vol. iii, page 34.

† Is property included in the seven categories, substance and the rest, or is it distinct therefrom? *Jagannátha* in the Digest, vol. ii, page 506: and ownership, in his opinion, following the *Nyáya* doctrine, "is a relation between cause and effect, attached to the owner who is predicated, of particular substances, and subsisting in the substance by connexion with the predicable."

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seems sufficient here to inquire into the nature of that property which is created by birth, for to this source must be traced all the impediments which exist to alienation; a man without heirs having an absolute and uncontrolled dominion over his property, by whatever means acquired. That an indefeasible, inchoate right is created by birth, seems to be universally admitted, though much argumentative discussion has been used to establish that this alone is not sufficient to create proprietary right. The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise,) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle;* that is, by the death of the owner (natural or civil), or his voluntary abandonment.† In ancestral real property, the right is always limited; and the sons, grandsons, and great-grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance,‡ are declared to possess an interest in such property equal to

Right of by inheritance how created.

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* *Sricrishna*, cited in the Digest, vol. ii, page 517.

† The fact of the ancestor being missing for a period exceeding twelve years, constitutes a legal title to succession on the part of the heirs. This doctrine was recognized in a case decided by the Sudder Dewanny Adawlut, on the 25th of April 1820: Reports, vol. iii, page 28, wherein it was determined, that twelve years should be allowed for the re-appearance of a missing person, after which his death will be presumed: but some authorities maintain, that the period varies with reference to the age of the missing person. See note to Case 7, vol. ii, p. 9.

‡ Various diseases and various offences have been declared by the Hindu legislators to be of such a nature as to disqualify for inheritance. It is problematical how far our courts would go in support of

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that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another.* With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility.† The property of the father being thus restricted in respect of ancestral real property, and wills and testaments being wholly unknown to the Hindu law, it follows, for the sake of consistency, that they must be wholly inoperative, and that their provisions must be set aside, where they are at variance with the law; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his lifetime.‡ A will is nothing more or less than "the legal declaration of a man's intentions, which he wills to be performed after his

Restrictions on alienation.

Of wills.

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objections which must in some instances be deemed irrational prejudices. The only reported case in which the question has been agitated, may be found in the Bengal Reports, pages 108 and 257, vol. ii; and in the Bombay Reports, page 411, vol. i, there is a case reported, in which a widow's claim to her husband's estate was disallowed on account of her blindness. For an enumeration of the disqualifying causes, see Digest of Hindu Law, page 298, vol. iii, and Elem. Hin. Law, App., page 335 et seq. and the chap., vol. ii, treating of Exclusion from Inheritance, to the note in which an enumeration of the several disqualifying circumstances has been given.

* *Jagannátha* in Dig., vol. iii, page 45.

† *Vrihaspati*, Dig., vol. ii, page 32.

‡ For a more full discussion of the right of a Hindu to make a will, see Considerations on Hindu Law, p. 320, wherein the opinion of Mr.

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death :" but willing to do that which the law has prohibited, cannot be held to be a *legal* declaration of a man's intentions. There may be a gift in contemplation of death, but a will, in the sense in which it is understood in the English law, is wholly unknown to the Hindu system; and such gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may not be done *inter vivos*, may not be done by will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons, by preferring one or excluding another without sufficient cause. This has been declared in the *Dáyabhága* to be a precept, not a positive law; and it is therein laid down, that a gift or transfer under such circumstances is not null; " for a fact cannot be altered by a hundred texts." There is nothing inconsistent in this, as the doctrine is rather confirmatory of the texts which de-

Doctrine of "*factum valet*" noticed.

Colebrooke is introduced, to which the doctrine here laid down is conformable. See also the case of Huree Bullubh Gungaram *v.* Keshoram Sheodas, Bombay Reports, vol. ii, page 6, in which the plea of a will in opposition to the claims of heirs was treated as inadmissible, and repugnant to the Hindu law, and the case of Sobharam Sumbhoodas *v.* Purmanund Bhaeechund, ibid., page 471 ; also the case of Musst. Goolaub *v.* Musst. Phool, vol. i, page 154 ; and that of Gungaram Viswunath *v.* Tappee Baee, ibid., page 372, and of Tooljaram Hurjeevun *v.* Hurbheram and another, ibid., 380 ; also App. Elem. Hin. Law, p. 9 *et passim*, and p. 405 *et seq.*

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clare the absolute nature of the father's power over such property; but it has been held to extend to the legalizing of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and the son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to signify that an act may be legally right, though morally objectionable. Thus a coparcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the *Mitácshará* prevails, (which does not recognize any several right until after partition, or the principle of *factum valet,*) would undoubtedly be both illegal and invalid. But according to the *Dáyabhága*, which recognizes this principle, and also a several though unascertained right in each coparcener, even before partition, a sale or other transfer under such circumstances would be valid and binding, as far as concerned the share of the transferring party. In the case of Bhowaneepershad Goh. *versus* Musst. Taramunee, it was determined by the Sudder Dewanny Adawlut, that according to the Hindu law as current in Bengal, a coparcener may dispose of, by gift or otherwise, his own undivided share of the ancestral landed property, notwithstanding he may have a daughter and a daughter's son living;* while in the case of Nundram and others, it was determined that, ac-

To what cases applicable.

* Sudder Dewanny Adawlut Reports, vol. iii, page 138. The same doctrine was held in the case of Ramkunhai Rai and others *v.* Bungchund Bunhoojea, ibid., 17, and the subject is more fully discussed by Mr. Colebrooke, in a note to vol. i, pp. 47 and 117.

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cording to the law as current in Behar, a gift of joint undivided property, whether real or personal, is not valid, even to the extent of the donor's own share.* I am aware that cases have been decided in opposition to the doctrine for which I here contend. These I propose briefly to notice.

Cases cited involving the doctrine of wills and unequal distributions.

The first on record is that of Rushiklal Dutt and Hurnaul Dutt, executors of the will of Mudunmohun Dutt *versus* Cheytunchurn Dutt, cited by Sir Thomas Strange, in his Elements of Hindu Law.† He states, that the case was decided about the year 1789; that the testator, a Hindu, the father of four sons, and possessed of property of both descriptions, ancestral and self-acquired, having provided for his eldest by appointment, and advanced to the three younger ones in his life the means of their establishment, thought proper to leave the whole of what he possessed to the two younger ones, to the disherison of the two elder, of whom the second disputed the will: that on reference to the pundits of the court, they affirmed the validity of the will, their answers being short; and that Sir W. Jones and Sir Robert Chambers concurred in this determination. The author of the Elements adds: "The ground with the Pundits probably was (the Bengal maxim), that, however inconsistent the act with the ordinary rules of inheritance and the legal pretensions of the parties, *being done*, its validity was unquestionable." To this it can only be answered, that the motives which actuated the pundits in their exposition of the law, and the judges in their decision, are avowedly stated on conjecture only; and that if such motives are allowed to operate, there must be an end to all law, the maxim of *factum valet* superseding every doctrine

* Case of Nundram and others *v.* Kashee Pande and others, Sudder Dewanny Adawlut Reports, vol. iii, page 232. The same doctrine was held in the case of Ooman Dutt *v.* Kunhia Singh, ibid., 144.

† Page 262.

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and legalizing every act. The particulars of the case not having been stated, it cannot with safety be relied on as a precedent.

The second case is that of Eshanchund Rai *versus* Eshorchund Rai, decided in the Sudder Dewanny Adawlut on the 23rd of February 1792.* In that case it was held, that a gift, in the nature of a will, made by the *zemindar* of Nuddea, settling the whole of his *zemindaree* on the eldest of his four sons, subject to a pecuniary provision for the younger ones, was good. The Pundits are stated to have assigned six reasons for this opinion, not one of which, except the last, appears entitled to any weight. The last reason assigned, namely, that a principality may lawfully and properly be given to an eldest son, is doubtless correct, and taking a *zemindaree* in the light of a principality, is applicable, and would alone have sufficed to legalize the transaction. A principality has indeed been enumerated among things impartible. But with respect to the other reasons assigned, they may be briefly replied to as follows. To the first, that, "According to law, a present made by a father to his son, through affection, shall not be shared by the brethren," it may be objected, that this relates to property other than ancestral, over which the father is expressly declared to have control. To the second, "That what has been acquired by any of the enumerated lawful means, among which inheritance is one, is a fit subject of gift," that this supposes an acquisition in which no other person is entitled to participate, and not the case of an ancestral estate, in which the right of the father and son has been declared equal. To the third, "That a coheir may dispose of his own share of undivided property," that his right

* Sudder Dewanny Adawlut Reports, vol. i, page 2.

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to do so is admitted; but this does not include his right to alienate the shares of others. To the fourth, "That although a father be forbidden to give away lands, yet if he nevertheless do so, he merely sins, and the gift holds good," that the precept extends only to property over which the father has absolute authority, and cannot affect the law, which expressly declares him to have no greater interest than his son in the ancestral estate. And to the fifth, "That *Raghunandana* in the *Dáyatatwa*, restricting a father from giving lands to one of his sons, but clothes and ornaments only, is at variance with *Jimutavahana*, whose doctrine he espouses, and who only says that a father acts blameably in so doing,' that no such variance in reality exists. In addition to the above, it may be stated, that the suit in question was brought by an uncle against his nephew, to recover a portion of an estate which had previously devolved entire on the brother of the claimant, and which, it appeared, had never been divided.*

The third case is that of Ramkoomar Neaee Bachesputee *versus* Kishenkinker Turk Bhoosun, decided by the Sudder Dewanny Adawlut on the 24th of November 1812.† In that case it was maintained, that the gift by a father of the whole ancestral estate to one son, to the prejudice of the rest, or even to a stranger, is a valid act, (although an immoral one,) according to the doctrine received in Bengal. To refute the opinion declared by the pundits on that occasion, it is merely necessary to state the authorities quoted by them, which would have been more applicable to the maintenance of the opposite doctrine. The following were the authorities

* See Appendix Elem. Hin. Law, page 437.

† Sudder Dewanny Adawlut Reports, vol. ii, page 42.

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cited in support of the above opinion. 1st. The text of *Vishnu* cited in the *Dáyabhága:* "When a father separates his sons from himself, his will regulates the division of his own acquired wealth." 2d. A quotation also from the *Dáyabhága:* "The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions; and has power to distribute them unequally; as *Yájnyawalcya* intimates: 'The father is master of the gems, pearls, and corals, and of all (other moveable property); but neither the father nor the grandfather is so of the whole immoveable estate.' Since the grandfather is here mentioned, the text must relate to his effects. By again saying, "all" after specifying 'gems, pearls,' &c., it is shown, that the father has authority to make a gift or any similar disposition of all effects, other than land, &c., but not of immoveables, a corrody, and chattels, (*i. e.*, slaves;) since here also it is said 'the whole,' this prohibition forbids the gift or other alienation of the whole, because (immoveable and similar possessions are) means of supporting the family. For the maintenance of the family is an indispensable obligation, as *Menu* positively declares: 'The support of persons who should be maintained, is the approved means of attaining heaven: but hell is the man's portion, if they suffer.' Therefore (let a master of a family) carefully maintain them. The prohibition is not against a donation or other transfer of a small part, not incompatible with the support of the family: for the insertion of the word 'whole' would be unmeaning, (if the gift of even a small part were forbidden.) The text of *Yájnyawalcya* cited in the *Prayushchitta-vivek:* "From the non-performance of acts which are enjoined, from the commission of acts which are declared to be criminal, and from not exercising a control over the passions, a man incurs

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punishment in the next world." An examination of the authorities above quoted, as given by the law officers in the case in question, will make it evident that they are totally insufficient for the support of the doctrine to which they were intended to apply.

The fourth case is that of Sham Singh *versus* Musst. Umraotee, decided in the Sudder Dewanny Adawlut on the 28th of July 1813,* on which occasion it was determined, that, by the Hindu law as current in Mithilá, a father cannot give away the whole ancestral property to one son to the exclusion of his other sons. The author of the Considerations on Hindu Law, commenting on this decision, infers that the Sudder Dewanny Adawlut would not have entertained any doubt as to the validity of the gift, had it depended upon the law as current in Bengal; but there seems to be no other ground for this inference than the erroneous doctrines laid down in the two previously cited cases, together with the fact of the parties having disputed as to which law should govern the decision.

The fifth case is that of Bhowannychurn Bunhoojea *versus* the Heirs of Ramkaunt Bunhoojea, which was decided in the Sudder Dewanny Adawlut on the 27th of December 1816,† and in which case it was ruled, that an unequal distribution made by a father among his sons of ancestral immoveable property is illegal and invalid, as is also the unequal distribution of property acquired by the father, and of moveable ancestral property, if made under the influence of a motive which is held in law to deprive a person of the power to

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* Sudder Dewanny Adawlut Reports, vol. ii, page 74.

† Ibid., page 202.

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make a distribution. The question as to the father's power was thoroughly investigated on this occasion. There being a difference of opinion between the Pundits attached to the Sudder Dewanny Adawlut, the following question was proposed to the Pundits of the Supreme Court, Tarapershad and Mrityoonjyee, to Nurahurree, Pundit of the Calcutta provincial court, and Ramajya, a Pundit attached to the College of Fort William: "A person whose elder son is alive, makes a gift to his younger, of all his property, moveable and immoveable, ancestral and acquired. Is such a gift valid, according to the law authorities current in Bengal, or not? and if it be invalid, is it to be set aside?"

The following answer, under the signatures of the four Pundits above mentioned, was received to this reference:—"If a father, whose elder son is alive, make a gift to his younger, of all his acquired property, moveable and immoveable, and of all the ancestral moveable property, the gift is valid, but the donor acts sinfully. If during the lifetime of an elder son, he make a gift to his younger, of all the ancestral immoveable property, such gift is not valid. Hence, if it have been made, it must be set aside. The learned have agreed that it must be set aside, because such a gift is *a fortiori* invalid; inasmuch as he (a father) cannot even make an unequal distribution among his sons of ancestral immoveable property; as he is not master of all; as he is required by law, even against his own will, to make a distribution among his sons of ancestral property not acquired by himself (*i. e.*, not recovered); as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born should be deprived of his share; and as, while he has children living, he has no authority over the ancestral property.

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"Authorities in support of the above opinions.

1st. *Vishnu*, cited in the *Dáyabhága* :—" His will regulates the division of his own acquired wealth." 2d. *Yájnyawalcya*, cited in the *Dáyabhága* :—" The father is master of the gems, pearls, corals, and of all other moveable property." 3d. *Dáyabhága* :—" The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions." 4th. *Dáyabhága* :—" But not so, if it were immoveable property inherited from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion." Unlimited discretion is interpreted by *Sricrishna Tarcalancára* to signify a competency of disposal at pleasure. 5th. *Dáyabhága* :—" Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth." Commentary of *Sricrishna* on the above texts :—" Although the father be in truth lord of all the wealth inherited from ancestors, still the right here meant is not merely ownership, but competency for disposing of the wealth at pleasure; and the father has not such full dominion over property ancestral." 6th. *Dáyabhága* :—" If the father recover paternal wealth seized by strangers, and not recovered by other sharers, nor by his own father, he shall not, unless willing, share it with his sons; for in fact it was acquired by him." In this passage, *Menu* and *Vishnu* declaring that " he shall not, unless willing, share it, because it was acquired by himself," seem thereby to intimate a partition amongst sons, even against the father's will, in the case of hereditary wealth not acquired (that is, recovered) by him. 7th. *Dáyabhága* :—" When the mother

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is past childbearing," regards wealth inherited from the paternal grandfather. Since other children cannot be borne by her when her courses have ceased, partition among sons may then take place; still, however, by the choice of the father. But if the hereditary estate were divided while she continued to be capable of bearing children, those born subsequently would be deprived of subsistence: neither would that be right; for a text expresses: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured." *Sricrishna* has interpreted "the dissipation of hereditary maintenance" to signify, the being deprived of a share in the ancestral wealth. *Dwaitanirnaya*:—"If there be offspring, the parents have no authority over the ancestral wealth; and from the declaration of their having no authority, any unauthorized act committed by them is invalid." Text of *Vijnyaneshwara,* cited in the *Medhatithi*:—"Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner." The term "without ownership," intends incompetency of disposal at pleasure. Text of *Náreda*:—"That act which is done by an infant, or by any person not possessing authority, must be considered as not done. The learned in the law have so declared."

I have given the above opinion, together with the authorities cited in its support, at full length, from its being apparently the most satisfactory doctrine hitherto recorded on the subject. By declaring void any illegal alienation of the ancestral real property, it preserves the law from the imputation of being a dead letter, and protects the son from being deprived by the caprice of the father, of that in which the law has repeatedly and expressly declared them both to

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have equal ownership. The case of Ramkaunt is the latest reported decision by the Sudder Dewanny Adawlut connected with the point in question. Various cases have been cited by the author of the "Considerations,"* in which wills made by Hindus have been upheld by the Supreme Court, though at variance with the doctrine above laid down. The will of rajah Nobkishen, who, although he had a begotten and an adopted son, left an ancestral *talook* to the sons of his brother, is perhaps the most remarkable of the cases cited; but in this, as well as in most of the others, the point of law was never touched upon, the parties having joined issue on questions of fact. Upon the whole, I conclude that the text of the *Dáyabhága*, which is the groundwork of all the doubts and perplexity that have been raised on this question, can merely be held to confer a legal power of alienating property, where such power is not expressly taken away by some other text. Thus in Bengal, a man may make an unequal distribution among his sons of his personally acquired property, or of the ancestral moveable property; because, though it has been enjoined† to a father not to distinguish one son at a partition made in his lifetime, nor on any account to exclude one from participation without sufficient cause, yet, as it has been declared in another place that the father is master of all moveable property, and of his own acquisitions,‡ the maxim that a fact cannot be altered by an hundred texts here applies to legalize a disregard of the injunction, there being texts declaratory of unlimited discretion, of equal authority with those which condemn the practice. In other parts of India, where the

Ancestral real property cannot be alienated at pleasure.

* See the chapter on Wills, page 316 *et passim*.

† *Catyáyana*, cited in Dig., vol. ii, page 540.

‡ *Yájnyawalcya*, Ibid., page 159.

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maxim in question does not obtain, the injunction applies in its full force, and any prohibited alienation would be considered illegal.* The subject will be resumed in the Chapter treating of Partition.

* Elements of Hindu Law, vol. i, page 123, and Appendix, Chap. 1st; and see Bombay Reports, pages 154, 372, and 380, vol. i, and pages 6 and 471, vol. ii.

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CHAPTER II.

Of Inheritance.

According to the Hindu law of inheritance, as it at present exists, all legitimate sons, living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired. In former times, the right of primogeniture prevailed to a certain extent; but that, with other usages, has been abrogated in the present or *Cali* age.* The right of representation is Of sons.

* See the case of Taliwur Singh *versus* Puhlwan Singh, Sudder Dewanny Adawlut Reports, vol. iii, page 203, wherein a claim of primogeniture being preferred, it was determined that priority of birth does not entitle to a larger portion. There is another decision on record (vol. ii, page 116) of a case in which there were sons by different wives, and one party claimed that the estate should be distributed according to the number of wives, without reference to the number of sons borne by each, (a distribution technically termed *Putnibhaga,)* averring that such had been the *Koolachar*, or immemorial usage of the family; but the Court determined that the distribution among them should be made, not with reference to the mothers, but with reference to the number of sons: being of opinion, that although, in cases of inheritance, *Koolachar*, or family usage, has the prescriptive force of law; yet, to establish *Koolachar*, it is necessary that the usage have been ancient and invariable. See also the case of Bhyroochund Rai *versus* Russoomunee, vol. i, page 27, and the case of Sheo Buksh Sing *versus* the Heirs

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also admitted, as far as the great-grandson; and the grandson and great-grandson, the father of the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed the term *putra*, or son, has been held to signify, in its strict acceptation, a grandson and great-grandson. An adopted son is a substitute for a son of the body, where none such exists, and is entitled to the same rights and privileges. Among the sons of the *Sudra* tribe, an illegitimate son by a slave girl takes with his legitimate brothers a half share; and where there are no sons (including sons' sons and grandsons), but only the son of a daughter, he is considered as a coheir, and takes an equal share.*

Of sons' sons.

In default of sons, the grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no more than the sons, however few, of another son.

Of sons' grandsons.

In default of sons and grandsons, the great-grandsons inherit; in which case they also take *per stirpes*, the sons, however numerous, of one grandson, taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled, had they survived.

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of Futteh Sing, vol. ii, page 265. See also Elem. Hin. Law, App., page 288. In the succession to principalities and large landed possessions, long established *Koolachar* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke, in a note to the Digest, (vol. ii, page 119,) that the great possessions called *zemindarees* in official language, are considered by modern Hindu lawyers as tributary principalities.

* *Mitac.*, Chap. I, Sect. xii, §§ 1 and 2.

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Of the widow.

In default of sons, grandsons, and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits, according to the law as current in Bengal, whether her late husband was separated, or was living as a member of an undivided family; but according to other schools, the widow succeeds to the inheritance in the former case only; an undivided brother being held to be the next heir. If there be more than one widow, their rights are equal.* Much discussion has arisen respecting the nature of the tenure by which a widow holds property that had devolved upon her by the death of her husband; and certainly the law, in this instance, as in many others, admits of great latitude of interpretation. It is well known, that between the Bengal and the other schools, there is a difference of opinion as to the circumstances under which a widow has a right to succeed to the property of her deceased husband. By the law as current in Bengal, as has been already observed, she is entitled to succeed, whether the husband was living in a state of union with, or separation from, his brethren. By that of other schools, only where the husband was separated from his brethren. So far, as to the right of succession, the law is clear and indisputable, but to what she succeeds is not so apparent. She has not an absolute proprietary right, neither can she, in strictness, be called even a tenant for life: for the law provides her successors, and restricts her use of the property to very narrow limits. She cannot dispose of the smallest part, except for necessary purposes, and certain other objects particularly specified. It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary interest have clearly

* See Elem. Hin. Law, App., page 59.

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a right to restrain her from so doing. What constitutes waste, however, must be determined by the circumstances of each individual case. The law has not defined the limits of her discretion with sufficient accuracy, and it was probably never in the contemplation of the legislator that the widow should live apart from, and out of the personal control of her husband's relations, or possess the ability to expend more than they might deem right and proper. In assigning a motive for the ordinance that a widow should succeed to her husband, and at the same time that she should be deprived of the advantages enjoyed by a tenant for life even, it seems most consistent with probability that it originated in a desire to secure, against all contingencies, a provision for the helpless widow, and thereby prevent her from having recourse to practices by which the fame and honour of the family might be tarnished. By giving her a nominal property, she acquires consideration and respectability, and by making her the depositary of the wealth, she is guarded against the neglect or cruelty of her husband's relations. At the same time, by limiting her power, a barrier is raised against the effects of female improvidence and worldly inexperience. This opinion receives corroboration from the distinction which prevails in the Benares school, which may be said to be the fountain and source of all Hindu law. By the provisions of that code, where the brothers are united with the deceased husband, and where consequently it is fair to presume a spirit of friendship and cordiality, and there is no reason to anticipate that the widow will be treated with neglect by the brothers, she is declared to have no right of succession. It is only where the family is divided, and where there might consequently be reason to apprehend a want of brotherly feeling, that the law deems it necessary to interpose, and protect her interests. And it may be here observed, that if a man die leaving more than one widow, (three

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widows, for instance,) the property is considered as vesting in only one individual: thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows.

According to the doctrine of the *Smriti Chandricá*, which is of great and paramount authority in the south of India, a widow, being the mother of daughters, takes her husband's property, both moveable and immoveable, where the family is divided; but a childless widow takes only the moveable property. Where there are two widows, one the mother of daughters and the other childless, the former alone takes the immoveable estate, and the moveable property is equally divided between them.

Of the daughter.

In default of the widow, the daughter inherits, but neither is her interest absolute. According to the doctrine of the Bengal school, the unmarried daughter is first entitled to the succession: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have male issue, are together entitled to the succession;* and on failure of either of them, the other takes the heritage. Under no circumstances can the daughters, who are either barren, or widows destitute of male issue, or the mothers of daughters only, inherit the property.

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* A distinction is made by *Sricrishna*, in his commentary on the *Dáyabhága*, in respect of unmarried daughters. He is of opinion, that the daughter who is not betrothed is first entitled to the inheritance, and in her default the daughter who is betrothed; but this doctrine is not concurred in by any other authority, and the author of the *Dáyaruhasya* expressly impugns it as untenable.

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Distinction in the Benares school.

But there is a difference in the law, as it obtains in Benares, on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that, in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren, or a childless widow.

And in the Mithila school.

According to the law of Mithilá, an unmarried daughter is preferred to one who is married: failing her, married daughters are entitled to the inheritance; but there is no distinction made among the married daughters; and one who is married, and has or is likely to have issue, is not preferred to one who is widowed and barren; nor is there any distinction made between indigence and wealth.

And where the family is undivided.

It may here be mentioned, that the above rule of succession is applicable to Bengal in every possible case; but, elsewhere, only where the family is divided: for according to the doctrine of the Benares and other schools, even the widow, to whom the daughter is postponed, can never inherit, where the family is in a state of union; nor can the mother, daughter, daughter's son, or grandmother. The father's heirs in such case exclude them. But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death, in default of issue male. According to the law as received in Benares and elsewhere, it does not go, as her *Stridhun*, to her husband or other heir; and, according to the law of Bengal also, it reverts to her father's heirs.* In the case of Raj-

* It has been asserted by the author of the Elements of Hindu Law, page 161, that property, devolved on a daughter by inheritance

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chunder Das *versus* Dhunmunee, it was determined, that according to the Hindu law as current in Bengal, on the death of a widow who had claimed her husband's property, her daughter will inherit, to the exclusion of her husband's brother, if the daughter have or is likely to have male issue: and on her death without issue, her father's brother will inherit, to the exclusion of her husband.* But a curious case arose at Bombay,† involving the daughter's right, which deserves notice in this place. Of two widows, one had two sons, and the other a daughter. On the death of the latter widow, it became a question who was to succeed to her property, whether her daughter or the rival widow's sons. Various authorities were consulted, and they inclined to the opinion, that the daughter was not entitled to succeed as heir, inasmuch as property which had devolved on a widow, reverts at her death to her husband's heirs, among whom the daughter would have ranked, in default only of her own brothers.

According to the law of Bengal and Benares, the daughter's sons inherit, in default of the qualified daughters; but the right of daughters' sons is not recognized by the Mithilá school. If there be sons of more than one daughter, they take *per capita*, and not as the sons' sons do *per stirpes*.‡ If Of daughters' sons.

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is classed by the southern authorities as *Stridhun*, and descends accordingly. The authority cited for this doctrine is to be found in that part of the *Mitácshará* treating of woman's peculiar property, and consequently applies to the descent of that alone. I have not been able to meet with any other.

* Sudder Dewanny Adawlut Reports, vol. iii, page 362.

† Elem. Hindu Law, Appendix, p. 392.

‡ The same author states, page 160, that "where such sons are numerous, when they do take, they take *per stirpes*, and not *per capita*.

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one of several daughters, who had, as maidens, succeeded to their father's property, die leaving sons and sisters or sisters' sons, then, according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons;* and, if one of several daughters, who had, as married women, succeeded their father, die leaving sons, sisters or sisters' sons, according to the same law, the sisters exclude the sons; and if there be no sister, the property will be equally shared by her sons and her sisters' sons. This distinction does not seem to prevail any where but in Bengal. The author of the Considerations on Hindu Law has stated the following case:—"If there be three sisters who succeed jointly to their father's estate, A, B, and C, and supposing A to die childless, and B and C to survive her. Supposing also B to have one son, and C to have three sons, and supposing C to have died before A, and B to have survived her; it is agreed, that upon the death of A, her estate will go to B; but whether on the death of B, it shall go to her *only*

But the reverse of this is proved by the authority cited in its favour, Dig. vol. iii, page 501. *Jagannátha* there lays down the following rule; "Again, if daughters' sons be numerous, a distribution must be made. In that case, if there be two sons of one daughter, and three of another, five equal shares must be allotted: they shall not first divide the estate in two parts, and afterwards allot one share to each son." This principle was maintained also in the case of Randhun Sein and others *v.* Kishenkaunt Seìn and others, it being therein determined, that grandsons by different mothers claiming their maternal grandfather's property, take *per capita*, and not *per stirpes*. Sudder Dewanny Adawlut Reports, vol. iii, p. 100.

* Conformably to this doctrine, a case which orginated in the *zillah* court of Rungpore, was decided by the SudderDewanny Adawlut, on the 19th of April 1820, in which it was determined, (See Reports, vol. ii, p. 26,) that property inherited by a daughter goes at her death to her son or grandson, to the exclusion of her sister and sister's son.

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son, or be divided between him and the three sons of C, is *vexata quæstio.*" In this case, I apprehend, that if the property had devolved on the daughters at the time they were maidens, then on C's death her property would go to her three sons, and not to her sisters; but if they were married at the time, it would go to her sisters; and on the death of A, to B; and on the death of B, her son and the sons of C would take *per capita,* and this upon the general principle, that property which had devolved on a daughter is taken at her death by the heirs of her father, and not by the heirs of the daughter, and the father's heirs in this case are his daughters' sons, who are entitled to equal shares.* Under no circumstances can a daughter's son's son or other descendant, or her daughter or husband, inherit immediately from her the property which devolved on her at her father's death: such property, according to the tenets of all the schools, will devolve on her father's next heir, and will not go, as her *Stridhun,* to her own heir.

In default of daughters' sons, the father inherits, according to the law as current in Bengal; but according to other schools,† the mother succeeds to the exclusion of the father.

Of the mother.

In default of the father, the mother inherits. Her interest, however, is not absolute, and is of a nature similar to that of the widow. In a case of property which had devolved on a mother by the decease of her son, the law

* *Jim. Vah.* in the *Dáyabhága,* Chap. xi, Sec. 1, §§ 65, ii.—See Case 5, Chap. Rights of Daughters, &c., vol. ii.

† The different opinions on this point have been more fully stated in the note to Case 14, Rights of Daughters, &c., vol. ii.

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officers of the Sudder Dewanny Adawlut held, that the rules concerning property dovolving on a widow, equally affect property devolving on a mother.* On her death, the property devolves on the heirs of her son, and not on her heirs.

Of the brothers.

In default of father and mother, brothers inherit; first, the uterine associated brethren; next the unassociated brethren of the whole blood; thirdly, the associated brethren of the half blood; and fourthly, the unassociated brethren of the half blood. The above order supposes that the deceased had only uterine or only half brothers, and that they were either all united or all separated. But if a man die, leaving an uterine brother separated, and an half brother associated or re-united, these two will inherit the property in equal shares. Sisters are not enumerated in the order of heirs.

In a case recently decided in the Sudder Dewanny Adawlut, a question arose as to the relative rights of a brother and a brother's son to succeed, on the death of a widow, to property which had devolved on her at the death of her husband, they being the next heirs. The Pundits at first declared, that a brother's son (his father being dead) was entitled to inherit together with the brother. But this opinion was subsequently proved and admitted to be erroneous. In the succession to the estate of a grandfather, the right of representation unquestionably exists; that is to say, the son of a deceased son inherits together with his uncle: not so in the case of property left by a brother, the brother's son being enumerated in the order of heirs to a childless person's estate after the brother, and entitled to succeed only in default of the lat-

* Case of Musst. Bijia Dibia v. Unnapoorna Dibia, S. D. A. Reports, vol. i, p. 164.

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ter. In the case in question, the deceased left two brothers and a widow, and the widow succeeding, one of the brothers died during the time she held possession. The son of the brother who so died claimed, on the death of the widow, to inherit together with his uncle, and the fallacy of the opinion which maintained the justice of his claim consisted in supposing, that on the death of the first brother the right of inheritance of his other two surviving brothers immediately accrued, and that the dormant right of the brother who died secondly was transmitted to his son. But, in point of fact, while the widow survived, neither brother had even an inchoate right to inherit the property, and consequently the brother who died during her lifetime could not have transmitted to his son a right which never appertained to himself.*

Of the brothers' sons.

In default of brothers, their sons inherit in the same order; but in regard to their succession, there is this peculiarity, that if a brother's sons, whose father died previously to the devolution of the property, claim by right of representation, they take *per stirpes* with their uncle, being in that case grandsons inheriting with a son; but when the succession devolves on the brothers' sons alone as nephews, they take *per capita* as daughters' sons do. In the *Subodhini* it is stated, that the succession cannot, under any circumstances, take place *per capita*, but this opinion is overruled. He maintains also, that daughters of brothers inherit. In this opinion he is joined by *Nanda Pandita*, but the doctrine is elsewhere universally rejected.†

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* Case of Rooderchunder Chowdhry *v.* Sumbhoo Chunder Chowdhry, Sudder Dewanny Adawlut Reports, vol. iii, page 106. The same doctrine was maintained in the case of Musst. Jymunee Dibia *versus* Ramjoy Chowdhry, Ibid., 289.

† See note to *Mitácshará*, page 348.

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And grandsons.

Distinction.

If default of brothers' sons, their grandsons inherit in the same order, and in the same manner,* according to the law as currrent in Bengal; but the law of Benares, Mithilá, and other provinces, does not enumerate the brother's grandson in the order of heirs, and assigns to the paternal grandmother the place next to the brother's son.

Thus far, with the exceptions above noticed, the several schools concur as to the order of inheritance; but they differ more considerably with respect to the remoter heirs, as will be noticed hereafter.

Of sisters' sons.

In default of brothers' grandsons, sisters' sons inherit, according to the law of Bengal; but according to other schools, the paternal grandmother, as above stated, is ranked next to the brother's son, and the sister's son also is excluded from the enumerated heirs. This point of law was established in a case decided by the Sudder Dewanny Adawlut, in which the suit being for the landed estate of a deceased Hindu, situated in Bengal, by the son of his sister against the son of his paternal uncle, it was ruled, that according to the law of Bengal, the plaintiff would be heir, but according to the law of Mithilá the defendant.†

There is a difference of opinion among different writers of the Bengal school as to the whole and half blood; some main-

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* It may be here observed, however, that no re-union after separation can take place with a grandson's brother. Re-union can take place only with the three following relations: the father, the brother, and the paternal uncle. *Vrihaspati*, cited in the *Dáyabhága*, Chap. xi, Sec. 1, §§ 30.

† Case of Rajchunder Narain *v.* Goculchunder Goh, S. D. A. Reports, vol. i, page 43. See also Case 6, page 125, vol. ii.

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taining that an uterine sister's son excludes the son of a sister of the half blood: but according to the most approved anthorities, there should be no distinction. A sister's daughter is nowhere enumerated in the order of heirs.*

Of the other heirs according to the *dáyacramasangraha*.

In default of sisters' sons, the inheritance is thus continued, agreeably to the doctrine of the Bengal school, as laid down in the *Dáyacramasangraha*. Brother's daughter's son—Paternal grandfather—Paternal grandmother—Paternal uncle, his son and grandson—Paternal grandfather's daughter's son—Paternal uncle's daughter's son—Paternal great-grandfather—Paternal great-grandmother—Paternal grandfather's brother, his son and grandson—Paternal great-grandfather's daughter's son, and his brother's daughter's son. On failure of all these, the inheritance goes in the maternal line to the maternal grandfather;† the maternal uncle; his son and grandson, and daughter's son; the maternal great-grandfather, his son, grandson, great-grandson, and daughter's son; and to the maternal great-great-grandfather, his son, grandson, great-grandson, and daughter's son. In default of all these, the property goes to the remote kindred

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* *Nanda Pandita* and *Balambhatta* maintain, that the daughters also of sisters have a right of inheritance, but their opinion is universally rejected on this point. See note to *Mitácshará*, page 348. See also a case reported in Appendix, Elem. Hindu Law, page 249.

† It has been remarked by *Jagannátha* (page 530, vol. iii,) "That the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter, and so forth, claim succession in the order of proximity, before the maternal grandfather;" but this opinion does not seem to be supported by any authority.

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in the descending and ascending line, as far as the fourteenth in degree; then to the spiritual preceptor; the pupil; the fellow student;* those bearing the same family name; those descended from the same patriarch; Brahmins learned in the *Vedas;* and lastly, to the king, to whom, however, the property of a Brahmin can never escheat, but must be distributed among other Brahmins.

And according to *Sricrishna.*

The above order of succession, however, is by no means universally adhered to, even among the writers of the Bengal school. After the sister's son, *Sricrishna Tarcálancára,* in his commentary on the *Dáyabhága* places the paternal uncle of the whole blood; the paternal uncle of the half blood; the son of the paternal uncle of the whole blood; the son of the paternal uncle of the half blood; their grandsons successively; the paternal grandfather's daughter's son; the paternal grandfather; the paternal grandmother; the paternal grandfather's uterine brother; his half brother; their sons and grandsons successively; the paternal great-grandfather's daughter's son; the *Sapindas;* the maternal uncle and the rest, who present oblations which the deceased was bound to offer; the mother's sister's son; the maternal uncle's sons and grandsons; the grandson of the son's son, and other descendants for three generations in succession; the offspring of the paternal grandfather's grandfather, and other ancestors for three generations; the *Samanodacas;* and lastly, the spiritual teacher, &c., &c.

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* See a Bombay case cited in Elem. Hindu Law, Appendix, page 257, in which it was determined, that a fellow hermit is heir to an anchoret; his pupil to an ascetic; and his preceptor to a professed student of theology.

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The series of heirs is thus stated by the compilers of the *Vivádárnavasetu* and *Vivádabhangárnava*.* After the sister's son, the grandfather, next the grandmother; and afterwards the enumeration proceeds as follows. Uncle—uncle's son—grandson, and great-grandson—Grandfather's daughter's son—Great-grandfather—Great-grandmother—Their son, grandson, great-grandson, and daughter's son—Maternal grandfather—Maternal uncle, his son and grandson—The deceased's grandson's grandson (in the male line), his great-grandson, and his great-great-grandson. Then the ascending line succeed, namely, the paternal great-grandfather's-father, his son, grandson, and great-grandson.† And according to other authorities.

The above cited four authorities are of the greatest weight in the province of Bengal; and where they differ, reliance may with safety be placed on the *Dáyacramasangraha* of *Sricrishna*.‡ It will be observed, however, that all these authorities concur in the order of enumeration as far as the sister's son, which perhaps is all that will be requisite for practical purposes; and it would be but a waste of time to enter into any disquisition as to the differences of opinion entertained by writers of inferior importance.

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* Among modern digests, the most remarkable are the *Vivádárnavasetu*, compiled by order of Mr. Hastings; *Vivadasararnava*, compiled at the request of Sir William Jones; and the *Vivádabhungárnava*, by *Jagannátha*.—Colebrooke's Preface to Digest, page 23.

† *Jagannátha* so far differs from the series here given, that he assigns a place next to the maternal uncle's grandson to the maternal great-grandfather and the maternal great-great-grandfather and their descendants. He also is of opinion, that of the male descendants of the paternal grandfather and great-grandfather, those related by the whole blood should exclude those of the half blood.

‡ See the opinion of Mr. Colebrooke, cited in Elem. Hindu Law, Appendix, 261.

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Order of succession according to the Benares school.

According to the law as current in Benares, in default of the son, and son's son and grandson, the widow (supposing the husband's estate to have been distinct and separate) succeeds to the property under the limited tenure above specified. But if her husband's estate was joint, and held in coparcenary, she is only entitled to maintenance.

In default of the widow, the maiden daughter inherits. In her default, the married indigent daughter. In her default, the married wealthy daughter. Then the daughter's son, but the *Vivádachandra*, the *Vivádaratnacara*, and *Vivádachintámani*, authorities which are current in Mithilá, do not enumerate the daughter's son among the series of heirs.* The mother ranks next in the order of succession,† and after her

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* According to the commentary of *Balambhatta*, the daughter's daughter inherits, in default of the daughter's son; but this is not the received opinion: and in a case decided by the Court of Sudder Dewanny Adawlut, according to the law of Bengal, (Sudder Dewanny Adawlut Reports, vol. ii, p. 290,) it was determined, where two of four daughters died during the lifetime of their mother, and one of them left a daughter, which daughter sued her aunts for a fourth of the property in right of her mother, that there was no legal foundation for the claim.

† The same commentator says, the father should inherit first, and then the mother. *Nanda Pandita*, the author of a commentary on the *Mitácshará*, concurs in the opinion of *Balambhatta*. *Apararca*, another commentator, *Camalacara*, the author of the *Vivádatandava*, the authors of the *Smritichandricá*, *Madana Rutna*, *Vyavahára-mayúcha*, *Vivadachandrica*, *Rutnácara*, and other authorities current in Benares, give the father the preference over the mother, and *Jimutavahana*, *Raghunandana*, and all other Bengal authorities adopt this doctrine; but all the other Benares authorities follow the text of the *Mitácshara*, which assigns the preference to the mother, while *Sricara* maintains that the father and mother inherit together.

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the father. In default of him, brothers of the whole blood succeed; and in their default, those of the half blood.*

In their default, their sons inherit successively;† then the paternal grandmother;‡ next the paternal grandfather; the paternal uncle of the whole blood; of the half blood; their sons successively; the paternal great-grandmother;§ the paternal grandfather, his son and grandson, successively; the paternal great-grandfather's mother;|| his father, his brother, his brother's son. In default of all these, the *Sapindas* in the same order as far as the seventh in degree, which includes only one grade higher in the order of ascent than the heirs above enumerated. In default of *Sapindas*, the *Samanodacas* succeed; and these include the above enumerated heirs in the same order as far as the fourteenth in degree.¶ In default of the *Samanodacas*, the *Bundhoos* or cognates succeed. These kindred are of three descriptions; personal, paternal, and maternal. The personal kindred are, the sons of his own father's sister; the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are,

* *Balambhatta* is of opinion, that brothers and sisters should inherit together; but this doctrine is not received.

† And, according to *Balambhatta*, brothers' daughters, and brothers' sons inherit together; but neither is this opinion followed.

‡ *Sricara Acharjya* maintains, that the brothers' grandsons have a title to the succession in default of the brothers' sons; and this opinion is also held by the author of the *Vivádachandricá*, but by no other authority; and there is the same difference of opinion, as to the relative priority of the grandmother, as has been noticed in the case of the father and mother.

§ The same difference of opinion exists in this case also.

|| And in this case.

¶ The term *Gotraja* (or gentiles) has been defined to signify *Sapindas* and *Samanodacas* by *Balambhatta*, and in the *Subodhini*, &c.

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the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle.* In default of them, the *Achárjya* or spiritual preceptor, the pupil, fellow student in theology, learned Brahmins; and lastly, always excepting the property of Brahmins, the estate escheats to the ruling power.

According to other schools.

The order of succession as it obtains in Mithilá corresponds with what is here laid down. In the case of Gungadutt Jha *v.* Sreenarain and Musst. Leelawutee, (Sudder Dewanny Adawlut Reports, vol. ii, page 11,) it was determined, that according to the law as current in Mithilá, claimants to inheritance, as far as the seventh *(Sapindas)* and even the fourteenth in descent *(Samanodacas)* in the male line from a common ancestor, are preferable to the cousin by the mother's side of the deceased proprietor; that is to say, his mother's sister's son. Had the case in question being decided according to the law of Bengal, (which, the parties there residing, would have so happened; had it not been determined that a person settling in a foreign district shall not be deprived of the laws of his native district, provided he adhere to its customs and usages,) the mother's sister's son would have obtained the preference; that individual ranking, agreeably to the law of Bengal,

* See *Mitácshará*, page 352. In this series, no provision appears to have been made for the maternal relations in the ascending line; but *Vachespatimisra* in the *Vivádachintámani*, assigns to "the maternal uncle and the rest," *(Matooladi)* a place in the order of succession next to the *Samanodacas;* and *Mitramisra*, in the *Veeramitrodaya*, expresses his opinion, that as the maternal uncle's son inherits, he himself should be held to have the same right by analogy.

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between the *Sapindas* and the *Samanodacas*, as was exemplified in the case of Roopchurn Mohapater *v.* Anund Lal Khan, (Sudder Dewanny Adawlut Reports, vol. ii, page 35,) in which it was determined, according to an exposition of the Hindu Law as current in Bengal, that the son of a maternal uncle (who is also a *Bundhoo*) takes the inheritance in preference to lineal descendants from a common ancestor, beyond the third in ascent.

The order of succession, agreeably to the law as current in the south of India, does not appear to differ from that of Benares.

In the *Vyavahároamayúc'ha*, an authority of great eminence in the west of India, a considerable deviation from the above order appears; and the heirs, after the mother, are thus enumerated. The brother of the whole blood, his son, the paternal grandmother, the sister,* the paternal grandfather, and the brother of the half blood, who inherit together. In default of these, the *Sapindas*, the *Samanodacas*, and the *Bundhoos* inherit successively, according to their degree of proximity.

It may be stated, as a general principle of the law as applicable to all the schools, that he with whom rests the right of performing obsequies is entitled to preference in the order of succession; but there are exceptions to this rule;

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* The Bombay Reports, vol. ii, page 471, exhibit a case demonstrative of the sister's right according to this doctrine, and in a suit between two cousins for the property of their maternal uncle, it was held that neither had any right during the lifetime of their uncle's sister. There is another similar case in vol. i, page 71. But this admission of the sister seems peculiar to the doctrine followed on that side of India. See Colebrooke, cited in Appendix, Elem. Hindu Law, page 252.

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for instance, in the case of a widow dying and leaving a brother and daughter her surviving, the daughter takes to the exclusion of the brother, although the exequial ceremonies must be performed by the latter.* The passages of Hindu law which intimate that the succession to the estate and the right of performing obsequies go together, do not imply that the mere act of celebrating the funeral rites gives a title to the succession; but that the successor is bound to the due performance of the last rites for the person whose wealth has devolved on him.†

* Elem. Hin. Law, App., pp. 245 and 251.
† Note to S. D. A. Reports, vol. i, p. 22.

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CHAPTER III.

Of Stridhun, or woman's separate property.

This description of property is not governed by the ordinary rules of inheritance. It is peculiar and distinct, and the succession to it varies according to circumstances. It varies according to the condition of the woman, and the means by which she became possessed of the property.*

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* According to the Hindu law, there are several sorts of this species of property, some of which are as follows. *Adhyagnica*, or what was given before the nuptial fire. *Adhybahana*, or what was given at the bridal procession. *Preetidutta*, or what was given in token of affection. *Mátripitri* and *Bhrátridutta*, or what was received from a mother, father, and brother. *Adhividhanica*, or a gift on a second marriage, i. e., wealth given by a man for the sake of satisfying his first wife, when desirous of espousing a second. *Paranayayung*, or *paraphernalia*. *Anwadhayica*, or gift subsequent. *Sowdayica*, or gift from affectionate kindred. *Sulca*, or perquisite. *Yautuca*, or what was received at marriage. *Padabundanica*, or what was given to the wife in return of her humble salutation. Some lawyers class the *Preetidutta* and the *Padabundanica* as one species of woman's property, under the appellation of *Lavanyarjita*, or what was gained by loveliness.

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In the *Mitácshará*, whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*. Authors differ in their enumeration of the various sorts of *Stridhun*, some confining the number to eight, others to six, others to five, and others to three; but as the difference consists in a more or less comprehensive classification, it does not require any particular notice. The most comprehensive definition of a married woman's *peculium*, is given in the following text of *Menu*:—"What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the sixfold separate property of a married woman."* And it may be here observed, that *Stridhun* which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterward governed by the ordinary rules of inheritance: for instance, property given to a woman on her marriage is *Stridhun*, and passes to her daughter, at her death; but at the daughter's death, it passes to the heir of the daughter like other property; and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue.

Definition of *Stridhun*, according to *Menu*.

Succession to

Where the deceased was unmarried;

To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively; and failing these, her paternal kinsmen in due order.

And where married.

To such property left by a married woman given to her at the time of her nuptials, the heirs are her daughters; the maiden, as in the ordinary law of inheritance, ranking first,

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* §§ 365.

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and then the married daughter likely to have male issue.* The barren and the widowed daughters, failing the two first, succeed as coheirs. In default of daughters, the son succeeds; then the daughter's son,† the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson and her great-grandson in the male line. In default of all these descendants, supposing the marriage to have been celebrated according to any of the five first forms,‡ the husband succeeds, and the brother, the mother, the father. But if celebrated according to any of the three last forms,§ the brother is preferred to the husband, and both are postponed to the mother and father. In default of these, the heirs are successively as follows:—Husband's younger brother, his younger brother's son, his elder brother's son, the sister's son, husband's sister's son, the brother's son, the son-in law, the father-in-law, the elder brother-in-law, the *Sapindas*, the *Saculyas*, the *Samanadocas*.

To such property left by a married woman given to her by her father, but not at the time of her nuptials, the heirs are And if given to her by her father.

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* It may here be mentioned, that at the death of a maiden or betrothed daughter on whom the inheritance had devolved, and who proved barren, or on the death of a widow who had not given birth to a son, the succession of the property which they had so inherited will devolve next on the sisters having and likely to have male issue; and in their default, on the barren and widowed daughters.

† According to *Jimutavahana*, the right of the daughter's son is postponed to that of the son of the contemporary wife; but his opinion in this respect is refuted by *Sricrishna* and other eminent authorities.

‡ For an enumeration of these forms, see the Chapter on Marriage.

§ The justice of this order of succession does not at first sight seem obvious, at least as regards the *Asura* marriage, where money is advanced by the family of the bridegroom, and to which, therefore, it would appear equitable that it should revert on the death of the bride.

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successively, a maiden daughter, a son, a daughter who has or is likely to have male issue, daughter's son, son's son, son's grandson, the great-grandson in the male line, the son of a contemporary wife, her grandson, her great-grandson in the male line. In default of all these, the barren and the widowed daughters succeed as coheirs, and then the succession goes as in the five first forms of marriage.

And if not given to her by her father.

To such property left by a married woman not given to her by her father, and not given to her at the time of her nuptials, the heirs are in the same order as above, with the exception that the son and unmarried daughter inherit together, and not successively, and that the son's son is preferred to the daughter's son.*

Power of a woman over her *Stridhun*.

It may here be observed, that the Hindu law recognizes the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition at pleasure. He has nevertheless power to use the woman's *peculium*, and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property.†

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* But *Raghunandana* holds, that in the case of a married woman dying without issue, the husband alone has a right to the property of his wife, bestowed on her by him after marriage; but that the brother has in such case the prior right to any property which may have been given to her by her father and mother.

† The order above given is chiefly taken from Colebrooke's translation of the *Dáyabhága*, page 100. I do not find that the law in this particular varies materially in the different schools; except that (as in the case of succession to ordinary property) a distinction is made by the law of Benares and other schools, between wealthy and indigent

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daughters. There are also many other nice distinctions and discrepancies of opinion, of which the following are specimens, and which it is unimportant to notice at greater length in this place. According to *Jimutaváhana* and the mass of Bengal authorities, the property of a deceased woman not received at her nuptials, and not given to her by her father, goes to her son and to her unmarried daughters in equal portions, whether the latter have been betrothed or otherwise. *Jagannátha* is of opinion, that the succession of a daughter who has been betrothed is barred by the claim of one who has not been affianced, and that both cannot have an equal right to inherit with a brother. *Raghunandana* denies that there is any text justifying the succession of a betrothed daughter. The authors of the *Vyavahàramayúc'ha*, and *Veeramitrodaya* distinctly state, that in default of a maiden daughter, a married one whose husband is living takes the inheritance with her brother. According to the *Mitácshará* and other ancient authorities current in Benares, the brothers and sisters cannot under any circumstances inherit together; while *Madhavácharjya* states, that sons and daughters inherit their mother's *peculium* together, only where it was derived from the family of the husband; and *Vachespati Bhuttácharjya*, on the other hand, contends that they inherit simultaneously in every instance, excepting that of property received at nuptials, and given by parents. The conflicting doctrines in matters such as the above, of minor moment, might be multiplied almost *ad infinitum*.

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CHAPTER IV.

Of Partition.

Having treated of the subject of property acquired by succession, it remains to treat of that which is acquired by partition while the ancestor survives, and by partition among the heirs, after succession.

The father's consent is requisite to partition, and, while he lives, the sons have not, according to the law of Bengal, the power to exact it, excepting under such circumstances as would altogether divest him of his proprietary right, such as his degradation, or his adoption of a religious life. *Jagannátha* has, indeed, expressed an opinion, that sons, oppressed by a step-mother or the like, may apply to the king, and obtain a partition from their father of the patrimony inherited from the grandfather, though not a partition of wealth acquired by the father himself. To the father's right of making a partition there is but one condition annexed, namely, that the mother be past childbearing, and this condition applies to ancestral immoveable property alone: as to his self-acquired estate, whether it consist of moveable or immoveable property, and the ancestral property of whatever description which may have been usurped by a stranger, but recovered by the father, his own consent is the only requisite to partition. But the law as current in Benares and other schools, differs widely from that of Bengal, in

Father's consent requisite to partition in Bengal.

Exception.

Opinion of *Jagannátha*.

Condition.

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Partition of ancestral estate demandable by sons according to the law of Benares.

respect to partition of the ancestral estate, which, according to the former, may be enforced at the pleasure of the sons, if the mother be incapable of bearing more issue, even though the father retain his worldly affections, and though he be averse to partition.*

How to be made by the father according to the law of Bengal.

According to the law of Bengal, the father may make an unequal distribution of property acquired by himself exclusively, as well as of moveable ancestral property, and of property of whatever description, recovered by himself, retaining in his own hands as much as he may think fit; and should the distribution he makes be unequal, or should he without just cause exclude any one of his sons, the act is valid, though sinful; not so with respect to the ancestral immoveable estate and property, to the acquisition of which his sons may have contributed: of such property the sons are entitled to equal shares; but the father may retain a double share of it, as well as of acquisitions made by his sons.

And Benares.

The law of Benares, on the other hand, prohibits any unequal distribution by the father of ancestral property of whatever description, as well as of immoveable property acquired by himself. At a distribution of his own personal acquisitions even, he cannot, according to the same law, reserve more than two shares for himself; and as the maxim of *factum valet* does not apply in that school, any unequal distribution of real property must be considered as not only sinful, but illegal.†

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* *Mitac.*, Ch. i, Sec. 2, §§ 7.

† Though as the father is not precluded from disposing of moveables at his discretion, a *gift* of such property to one son should not be deemed invalid. Colebrooke, cited in Elem. Hin. Law, App., p. 5; and as to the father's incompetency to dispose of immoveable property, though acquired by himself, see Ibid., p. 7.

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This subject has been treated of at great length by the author of the Considerations on Hindu Law, in the chapter on gifts and unequal distribution: and though he confesses it to be one of a most perplexing nature, from the variety of opposite decisions to which it has given rise, yet he inclines to the opinion, that a gift of even the entire ancestral immoveable property to one son, to the exclusion of the rest, is sinful, but nevertheless *valid*, if made. It must be recollected, that he was treating of the law as current in Bengal only, and not elsewhere. My reasons for arriving at an opposite opinion are; first, because the doctrine for which I contend has been established by the latest decision, founded on a more minute and deliberate investigation of the law of the case than had ever before been made; and secondly, because the only authority for the reverse of this doctrine consists in the following passages from the *Dáyabhága*:— "The texts of *Vyása* exhibiting a prohibition are intended to show a moral offence; they are not meant to invalidate the sale or other transfer. Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred texts." Now if these passages are to be taken in a general sense; if they are to be held to have the effect of legalising or at least rendering valid all acts committed in direct opposition to the law, they must have the effect of superseding all law; and it would be better at once to pronounce those texts alone to be the guide for our judicial decisions. The example adduced by the commentator to illustrate these texts, clearly shows the spirit in which this unmeaning, though mischievous dogma was delivered; he declares, that a fact cannot be altered by a hundred texts, in the same manner as the murder of a Brahmin, though in the highest degree criminal and unlawful, having been perpetrated, there is no remedy, or in other words, that

Argument against unequal partition in certain cases.

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the defunct Brahmin cannot be brought to life again. The illustration might be apposite, if there were no such thing as retribution, and if the law did not exact all possible amends for the injury inflicted. But what renders this conclusion less disputable is, that the texts of *Vyása* in question occur in the chapter of the *Dáyabhága* which treats of self-acquisitions, and has no reference to ancestral property. If any additional proof be wanting of the father's incompetency to dispose of ancestral real property by an unequal partition, or to do any other act with respect to it which might be prejudicial to the interests of his son, I would merely refer to the provision contained in Chap. iii, Sect. 7, §§ 10, of the translation of the extract from the *Mitácshará* relative to judicial proceedings. The rule is in the following terms: "The ownership of father and son is the same in land which was acquired by his father," &c. From this text it appears, that in the case of land acquired by the grandfather, the ownership of father and son is equal; and therefore, if the father make away with the immoveable property so acquired by the grandfather, and if the son has recourse to a court of justice, a judicial proceeding will be entertained between the father and son." The passage occurs in a dissertation as to who are fit parties in judicial proceedings; and although the indecorum of a contest wherein the father and son are litigant parties has been expressly recognized, yet, at the same time, the rights of the son are declared to be of so inviolable a nature, that an action by him for the maintenance of them will lie against his father, and that it is better there should be a breach of moral decorum than a violation of legal right.

The question as to the extent to which an unequal distribution made by a father in the province of Bengal should be upheld, has been amply discussed also in the report of a case decided by the Court of Sudder Dewanny

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Adawlut in the year 1816,* wherein it was determined, that an unequal distribution of ancestral immoveable property is illegal and invalid, and that the unequal distribution of property acquired by the father, and of moveable ancestral property, is legal and valid, unless when made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. It was declared, in a note to that case, that the validity of an unequal distribution of ancestral immoveable property, such as is expressly forbidden by the received authorities on Hindu law, cannot be maintained on any construction of that law, by *Jimutaváhana* or others. *Jagannátha,* in his Digest, maintains an opinion opposite to this, and lays it down, that if a father, infringing the law, absolutely give away the whole or part of the immoveable ancestral property, such gift is valid, provided he be not under the influence of anger or other disqualifying motive: and admitting this doctrine to be correct, it must be inferred *a fortiori* that he is authorized to make an unequal distribution of such property; but the reverse of this doctrine has been established by the mass of authorities cited in the case above alluded to. Case cited. Opinion of *Jagannátha* overruled.

In the event of a son being born after partition made by the father, he will be sole heir to the property retained by the father; and if none have been retained, the other sons are bound to contribute to a share out of their portions. According to *Jimutaváhana, Raghunandana, Sricrishna,* and other Bengal authors, when partition is made by a father, a share equal to that of a son must be given to the childless wife, not to her who has male issue. But the doctrine laid down by *Harinátha* is, that if the father reserve two or more shares, no share need be assigned to the wives, Right of son born after partition. Childless wives entitled to share according to Bengal authorities. Opinion of *Harinátha.*

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* For the whole of the argument, see Sudder Dewanny Adawlut Reports, vol. ii, page 214.

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because their maintenance may be supplied out of the portion reserved. It is also laid down in the *Vivádárnavasetu*, that an equal share to a wife is ordained, in a case where the father gives equal shares to his sons; but that where he gives unequal portions, and reserves a larger share for himself, he is bound to allot to each of his wives, from the property reserved by himself, as much as may amount to the average share of a son. These shares to wives are allotted only in case of no property having been given to them. According to some authorities, if she had received property elsewhere, a moiety of a son's share should be allotted to them; but according to other authorities, the difference should be made up to them between what they have received and a son's share. The doctrine maintained by *Jagannátha* is, that if the wife has received, from any quarter, wealth which would have devolved ultimately on her husband, such wealth should be included in the calculation of her allotment; but if she received the property from her own father or other relative, or from the maternal uncle or other collateral kinsman of her husband, it should not be included, her husband not having any interest therein.

Vivádárnavasetu.

Rule where the wife has received property.

The law as current in Benares, Mithilá, and elsewhere, differs from the Bengal school on this subject, and is not in itself uniform or consistent. *Vijnyaneswara* ordains: "When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or father-in-law, must be made participants of shares equal to those of sons." But if separate property had been given, the same authority subsequently directs the allotment of half a share; "or if any had been given, let him assign the half." According to *Madhavácharjya*, if the father by his own free will make his sons equal participants, he ought to make his wives, to whom no separate property has

Doctrines of the Benares and other schools as to the shares of wives.

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been given, partakers of a share equal to that of a son; but if such property has been presented to her, then a moiety should be given. *Cumulacara*, the author of the *Vivâda-tandava*, declares generally, that whether the father be living or dead, his wives are respectively entitled to a son's portion. But *Sulapani*, in the *Dipacalica*, maintains, that if the father make an equal partition among his sons by his own choice, he must give equal shares to such of his wives only as have no male issue: and *Helayudha* also lays it down, that wives who have no sons are here intended. *Misra* contends, that "when he reserves the greater part of his fortune, and gives some trifle to his sons, or takes a double share for himself, the husband must give so much wealth to his wives out of his own share alone: accordingly, the separate delivery of shares to wives is only ordained when he makes an equal partition." The sum of the above arguments seems to be, that in the case of an equal partition made by a father among his sons, his wives who are destitute of male issue take equal portions; that, where he reserves a large portion for himself, his wives are not entitled to any specific share, but must be maintained by him; and that, where unequal shares are given to sons, the average of the shares of the sons should be taken for the purpose of ascertaining the allotments of the wives. The same rules apply also to paternal grandmothers, in case of partition of the ancestral property.

Sum of the arguments.

At any time after the death, natural or civil, of their parents, the brethren are competent to come to a partition among themselves of the property, moveable and immoveable, ancestral and acquired; and, according to the law as received in the province of Bengal, the widow is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it,

Partition when to be made by brethren.

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although her allotment will devolve on the heirs of her husband after her decease.* Partition may be made also while the mother survives. This rule, though at variance with the doctrine of *Jimutavahana,* has nevertheless been maintained by more modern authorities, and is universally observed in practice.†

Rights of nephews.

Nephews whose fathers are dead, are entitled, as far as the fourth in descent, to participate equally with the brethren. These take *per stirpes,* and any one of the coparceners may insist on the partition of his share.‡

Of mothers and daughters.

But in all such cases, to each of the father's wives who is a mother, must be assigned a share equal to that of a son, and to the childless wives a sufficient maintenance; but according to the *Mitácshará* and other works current in Benares and the southern provinces, childless wives are also entitled to shares, the term *mata* being interpreted to signify both mother and step-mother. The *Smritichandrica* is the only authority which altogether excludes a mother from the right of participation. To the unmarried daughters such portions are allotted as may suffice for the due celebration of their nuptials.§ This portion has been fixed at

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* See note to the case of Bhyroochund Rai *v.* Russoomunee, Sudder Dewànny Adawlut Reports, vol. i, p. 28, and case of Neelkaunt Rai *v.* Munee Chowdrain, Ibid., 58; also case of Rani Bhawani Dibia and another *v.* Ranee Soorujmunee, Ibid., p. 135. The reverse is the case, according to the law of Benares. See the case of Duljeet Singh *v.* Sheomunook Singh, Ibid., 59.

† Dig. 3, 78.

‡ *Catyáyana,* cited in Dig. 3, 7; and see Elem. Hindu Law, Appendix, 292.

§ Ibid., 86 and 97.

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a fourth of the share of a brother: in other words, supposing there is one son and one daughter, the estate should be made into two parts, and one of those two parts made into four. The daughter takes one of these fourths. If there be two sons and one daughter, the estate should be made into three parts, and one of these three parts made into four. The daughter takes one of these fourths, or a twelfth. If there be one son and two daughters, the estate should be made into three parts, and two of those three parts made into four. The daughters take each one of these fourths.* But according to the best authorities, these proportions are not universally assignable; for where the estate is either too small to admit of this being given without inconvenience, or too large to render the gift of such portion unnecessary to the due celebration of the nuptials, the sisters are entitled to so much only as may suffice to defray the expenses of the marriage ceremony. In fine, this provision for the sisters, intended to uphold the general respectability of the family, is accorded rather as a matter of indulgence, than prescribed as a matter of right.† **Sisters interests undefined.**

Any improvement to joint property effected by one of the brethren, does not confer on him a title to a greater share;‡ but an acquisition made by one, by means of his own un-

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* *Mit.* on Inh., Chap. i, §§ 7.

† The question has been fully discussed by the author of the Considerations on Hindu Law, page 103 et seq. The inconsistency of the rules has been pointed out; but the same conclusion is arrived at, namely, that the sister's is a claim rather than a right. See the opinion of Mr. Sutherland, cited in Elem. Hin. Law, App., p. 301, which is to the same effect; and of Mr. Colebrooke, Ibid., pp. 361 and 385.

‡ *Mitac.*, Chap. i, Sec. 3, §§ 4; and Case 15, vol. ii, Chap. Effects liable and not liable to Partition, (note).

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assisted and exclusive labour, entitles the acquirer, according to the law as current in Bengal, to a double share on partition. And it was ruled by the Sudder Dewanny Adawlut, that where an estate is acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two-fifths should be given to the acquirer, and one-fifth to each of the other four.* But according to the law as current in Benares, the fact of one brother's having contributed personal labour while no exertion was made by the other, is not a ground of distinction. If the patrimonial stock was used, all the brethren share alike.† If the joint stock have not been used,‡ he by whose sole labour the acquisition has been made is alone entitled to the benefit of it.§ And where property has been acquired without aid from joint funds, by the exclusive industry of one member of an undivided family, others of the same family, although they were at the time living in coparcenary with him, have no right to participate in his acquisition.|| The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren.¶ It has also been

Share of the acquirer.

According to the law of Benares.

Case of land recovered.

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* S. D. A. Rep., vol. i, page 6.

† See note to Case 4, Chap. of Sons, &c., vol. ii,

‡ What constitutes the use of joint stock is not unfrequently very difficult to determine, and no general rule can be laid down applicable to all cases that may arise. Each individual case must be decided on its own merits. See Elem. Hindu Law, App., p. 306.

§ Dig. 3, 110.

|| Kaleepershaud Rai and others v. Digumber Rai and others, vol. ii, p. 237.

¶ *Sancha*, cited in Ibid., 365; and Elem. Hin. Law, App., p. 313.

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ruled, that if lands are acquired partly by the labour of one brother, and partly by the capital of another, each is entitled to half a share; and that if they were acquired by the joint labour and capital of one, and by the labour only of the other, two-thirds should belong to the former, and one-third to the latter; but this provision seems rather to be founded on a principle of equity than any specific rule of Hindu law.*

Presents received at nuptials, as well as the acquisitions of learning and valour, are, generally speaking, not claimable by the brethren on partition; and there are some things not subject to the ordinary law of partition: but for a more detailed account of indivisible and specially partible, the reader is referred to the translation of *Jagannátha's* Digest, vol. iii, page 332 *et seq* and to the Chapter in vol. ii, treating of effects liable and not liable to partition. According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property: in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother.†

Property not subject to partition.

Partition may be made without having recourse to writing or other formality; and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence. It cannot always be inferred from the manner in which the brethren live, as they may reside apparently in a state of union, and yet, in matters of property, each may be separate; while, on the other hand, they

Evidence of partition.

* Case of Koshul Chukrawutee *v.* Radhanauth, S. D. A. Reports, vol. i, page 336.

† Elem. Hin. Law, App., p. 322.

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may reside apart, and yet may be in a state of union with respect to property: though it undoubtedly is one among the presumptive proofs to which recourse may be had, in a case of uncertainty, to determine whether a family be united or separate in regard to acquisitions and property.* The only criterion seems to consist in their entering into distinct contracts, in their becoming sureties one for the other, or in their separate performance of other similar acts, which tend to show, that they have no dependance on or connexion with each other.† In case of an undivided Hindu family, the Court of Sudder Dewanny Adawlut were of opinion that their acquisitions should be presumed to have been joint till proved otherwise, the *onus probandi* resting with the party claiming exclusive right;‡ and, in another case, a member of a Hindu family, among whom there had been no formal articles of separation, but who, as well as his father, messed separately from the rest, and had no share of their profits and loss in trade, though he had occasionally been employed by them, and had received supplies for his private expenses, was presumed to be separate, and not allowed a share of the acquisition made by others of the family.§ The law is particularly careful of the rights of those who may be born subsequent to a partition made by the father. With respect to ancestral property, it is not likely that the just

* See note to Sudder Dewanny Adawlut Reports, vol. i, page 36.

† Dig. 3, 414; and see cases, Chap. of Evidence of Partition; also Colebrooke, cited in Appendix, Elem. Hindu Law, page 325 et seq.

‡ Case of Gourchunder Rai and others *v.* Hurroohchunder Rai and others, S. D. A. Reports, vol. iv, page 162.

§ Rajkishor Rai and others *v.* the widow of Santoo Das, S. D. A. Reports, vol. i, p. 13.

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claims of any of the heirs can be defeated, as the law prohibits partition so long as the mother is capable of bearing issue; but to guard against the possibility of such an occurrence, it is provided, that the father shall retain two shares, to which shares, if a son be subsequently born, he is exclusively entitled. There is another provision also which forms an effectual safeguard against the destitution of children born subsequently to a partition, which consists in the father's right of resumption, in case of necessity, of the property which he may have distributed among his sons.*

* See Case 3, Chap. of Partition, vol. ii.

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CHAPTER V.

Of Marriage.

On the subject of marriage, it may be presumed that it has not often constituted a matter of litigation in the civil courts, from the circumstance, that points connected with it do not appear to have been referred to the Hindu law officers. Disputes connected with this topic, as well as those relating to matters of caste generally, are, for the most part, adjusted by reference to private arbitration. It is otherwise in the provinces subject to the presidencies of Madras and Bombay, where many matrimonial disagreements and questions relative to caste have been submitted to the adjudication of the established European courts.* As, however, questions relative to marriage are among those which the Company's courts are, by law, called upon to decide, it may not be amiss to cite some of the fundamental rules connected with the institution.

Marriage, among the Hindus, is not merely a civil contract, but a sacrament; forming the last of the ceremonies

* See Appendix, Elements Hindu Law, page 22 et passim, and Bombay Reports, pages 11, 35, 363, 370, 379, and 389, vol. i, and pages 108, 323, 434, 473, 576, and 685, vol. ii.

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prescribed to the three regenerate classes, and the only one for *Sudras* ;* and an unmarried man has been declared to be incapacitated from the performance of religious duties.† It is well known that women are betrothed at a very early period of life, and it is this betrothment, in fact, which constitutes marriage. The contract is then valid and binding to all intents and purposes. It is complete and irrevocable immediately on the performance of certain ceremonies,‡ without consummation. Second marriages, after the death of the husband first espoused, are wholly unknown to the Hindu law ;§ though in practice, among the inferior castes, nothing is so common. Polygamy is also legally prohibited to men, unless for some good and sufficient cause, such as is expressly declared a just ground for dissolving the former contract, as barrenness, disease, or the like. This precept, however, is not much adhered to in practice. The text of *Menu*, which in fact prohibits polygamy, has been held, according to modern practice, to justify it. "For the first marriage of the twice-born classes," says *Menu*, "a woman of the same class is recommended; but for such as are impelled by inclination to marry again, women in the direct order of the classes are to be preferred."‖ From this text it is argued by

* Digest, vol. iii, page 104.

† Ibid., ii, page 400.

‡ Ibid., page 484 ; and for an account of ceremonies observed at a marriage, see As. Res., vol. vii, page 288 ; also Ward on the Hindus, vol. i, page 130 et seq.

§ But a widow who, from a wish to bear children, slights her deceased husband *by marrying again*, brings disgrace on herself here below, and shall be excluded from the seat of her lord.—*Menu*, cited in Dig., page 463, vol. ii.

‖ *Menu*, Chap. iii, §§ 12.

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the moderns, that, as marriage with any woman of a different class is prohibited in the present age, it necessarily follows that a plurality of wives of the same class is admissible; but the inference appears by no means clear, and the practice is admitted by the *pundits* to be reprehensible; though nothing is more common, especially among the *Kooleen*, or highest caste of Brahmins.

In the event of a man forsaking his wife without just cause, and marrying another, he shall pay his first wife a sum equal to the expenses of his second marriage, provided she have not received any *Stridhun*, or make it up to her, if she have; but he is not required, in any case, to assign more than a third of his property. In all cases, and for whatever cause a wife may have been deserted, she is entitled to sufficient maintenance. In the *Mitácshará*, a distinction is made. Where a second wife is married, there being a legal objection to the first, she is entitled to a sum equal to the expenses incurred in the second marriage; but, where no objection whatever exists to the first wife, a third of the husband's property should be given as a compensation.* But in modern practice, a husband considers it quite sufficient to maintain a superseded wife by providing her with food and raiment.

There are eight forms of marriage: The *Bramah*, *Daiva*, *Arsha*, *Prajapatya*, *Asura*, *Gandharva*, *Rácshasa*, and *Paisacha*.

The four first forms are peculiar to the *Brahminical* tribe. The principle in these contracts seems to be, that the parties

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* *Yájnyawalcya*, cited in Dig., vol. ii, page 420; and see a case to this effect stated, Elem. Hin. Law, App., p. 51.

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are mutually consenting, and actuated by disinterested motives.

The fifth form is peculiar to *Vaishyas* and *Sudras*. It is reprobated, on the principle of its being a mercenary contract, consented to by the father of the girl for a pecuniary consideration. The sixth and seventh forms are peculiar to the military tribe, where the union is founded either on reciprocal affection or the right of conquest. And the eighth or last is reprobated for all, being accomplished by means of fraud and circumvention.*

The most usual form of marriage is that of the *Brahma*, which is completed " when the damsel is given by her father, when he has decked her, as elegantly as he can, to the bridegroom whom he has invited," the nuptials of course being celebrated with the usual ceremonies. The next species of marriage most usually practised is that of the *Asura*, where a pecuniary consideration is received by the father; and I am given to understand that marriages by the *Paisacka* mode are not uncommon; and that young women, who from their wealth or beauty may be desirable objects, are, not unfrequently, inveigled by artifice into matrimony; the forms of which once gone through, the contract is not dissoluble on any plea of fraud, or even of force.†

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* Digest, vol. iii, page 606.

† This is not the only instance in which fraud is legalized by the Hindu law. That law sets aside gifts or promises made for the purpose of delusion, though this is fraud on the side of the person who practises the imposition, and can entitle him to no relief. The same law allows to the creditor a lien upon a deposit or commodate in his hands for the recovery of his due from the debtor who so entrusts any article to him; and even permits the practice of trick and artifice, to obtain

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The *Gandharva* marriage is the only one of the eight modes for the legalizing of which no forms are necessary;* and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, "reciprocal amorous agreement," would be sufficient to establish such a marriage, if corroborated by any word or deed on the part of the man.†

The relations with whom it is prohibited to contract matrimony are thus enumerated by *Menu*: "She who is not descended from his *paternal* or *maternal* ancestors within the sixth degree, and who is not *known by her family name to be* of the same primitive stock with his father or *mother*, is eligible by a twice-born man for nuptials and holy union."

Adultery is a criminal, but not a civil offence, and an action for damages preferred by the husband will not lie against the adulterer.‡ It is not a sufficient cause for the wife to

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possession of such an article with the purpose of retaining it as a pledge. —Colebrooke, Obl. and Con., Book ii, §§ 95 and Book iv, §§ 518.

* This form of marriage is declared to be peculiar to the military tribe. May not the indulgence have originated in principles similar to those by which, according both to the civil and English law, soldiers are permitted to make nuncupative wills, and to dispose of their property without those forms which the law requires in other cases?—Bl. Comm., vol. i, page 417.

† On this principle the law officers of the Sudder Dewanny Adawlut declared legal a marriage contracted in Cuttack, not very long ago, in a case where the parties had cohabited for some time, and the man signified his intention by placing a garland of flowers round the neck of the woman. See also Elem. Hin. Law, App., p. 198.

‡ Colebrooke, cited Elem. Hin. Law, App., p. 33. So also our Regulations, following the Moohummudan law in this particular, treat the

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desert the husband, and there are not many predicaments in which such an act on her part is justifiable. Insanity, impotence, and degradation, are, perhaps, the only circumstances under which her desertion of her husband would not be considered as a punishable offence.* A married woman has no power to contract, and any contract entered into by her, will neither be binding on herself nor on her husband, unless the subject of the contract be her own peculiar property, or unless she have been entrusted with the management of her busband's affairs; or unless the contract may have been requisite to her obtaining the necessaries of life.†

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offence as a crime against society, and not against the individual, but they require that the husband shall stand forward to prosecute. There is a case cited by the author of the Elem. Hin. Law, (App., p. 34.) in which the *pundits* ruled, that the adulterer was liable for the money expended by the injured husband in contracting a second marriage; but this was considered to be rather an equitable opinion, than founded on any express text of law.

* *Menu*, cited in Digest, vol. ii, page 412.

† Colebrooke, Obl. and Con., Part I, Book ii, §§ 57 and 58.

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CHAPTER VI.

Of Adoption.

The etymology of the Sanscrit word for a son *(putra)* clearly evinces the necessity by which every Hindu considers himself bound to perpetuate his name. "Since the son *(trayate)* delivers his father from the hell named *put,* he was, therefore, called *putra* by Brahma himself."* Again: "A son of any description should be anxiously adopted by one who has no male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name."† Under this feeling, it was natural to resort to the expedient of adoption. Twelve sorts of sons have accordingly been enumerated by *Menu.* "The son begotten by a man himself *in lawful wedlock;* the son of his wife, begotten in the manner before described; a son given *to him; a son made or adopted;* a son of concealed birth, *or whose real father cannot be known;* and a son rejected by his natural parents; are the six kinsmen and heirs. The son of a young woman *unmarried,* the son of a pregnant bride, a son bought, a son by a twice married woman, a son self-given, and a son by a *Sudra,* are the six kinsmen, but not heirs to *collaterals.*"‡

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* Institutes of *Menu,* Chap. ix, §§ 138.

† *Smriti,* quoted in the *Retnácara:* or, in the language of Statius, "*Orbitas omni fugienda nisu. Orbitas nullo tumulata fletu.*"

‡ Institutes of *Menu,* Chap. ix, §§ 159 and 160.

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In treating of the miscellaneous customs of Greece, the author of the Antiquities* observes as follows:—"Adopted children were called παιδεσθεταν or εισποιητοι, and were invested in all the privileges and rights of, and obliged to perform all the duties belonging to, such as were begotten by their fathers: and being thus provided for in another family, they ceased to have any claim of inheritance and kindred in the family which they have left, unless they first renounced their adoption, which the laws of Solon allowed them not to do, except they had first begotten children to bear the name of the person who had adopted them, thus providing against the ruin of families, which would have been extinguished by the ruin of those who were adopted to preserve them. If the adopted person died without children, the inheritance could not be aliened from the family into which they were adopted, but returned to the relations of the persons who had adopted them. The Athenians are by some thought to have forbidden any man to marry after he had adopted a son, without leave from the magistrate; and there is an instance in Tytzes's Chiliads of one Leogoras, who being ill used by Andocides the orator, who was his adopted son, desired leave to marry. However, it is certain that some men married after they had adopted sons; and if they begot legitimate children, their estates were equally shared between those begotten and adopted."

The whole, or nearly the whole, of the provisions above cited, are strictly applicable to the system of adoption as it prevails among the Hindus at this day. But the renunciation of adoption is a thing unheard of in these provinces, and unsanctioned by law under any circumstances. There is no express text declaring illegal a renunciation of adop-

* Vol. ii, p. 336.

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tion, but at the same time there is not any which can be construed as approaching to a justification of it.

In the present age, two, or at the most three, forms of adoption only are allowed, in these provinces; and the *Dattaca*, or son given, and the *Critrima*, or son made, are the most common. The latter form obtains only in the province of Mithilá. In strictness, perhaps, adoption in this form should be held to be abrogated, as the filiation of any but a son legally begotten, or given in adoption, is declared obsolete in the present age;* but agreeably to a text of *Vrihaspati*, immemorial usage legalizes any practice.† Some of the requisite conditions for the adoption of a son are comprized in the following texts of *Menu*:—"He whom his father or mother,‡ with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given, *the gift being confirmed* by *pouring* water." "He is considered as a son made or *adopted*, whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of *performing obsequies to his adopter*, and with the sin of omitting them."§ But there are many conditions besides these fundamental ones: and briefly noticing such of the rules as are indisputable, and universally admitted, I shall discuss those which have admitted of doubt; and endeavour to fix such as are uncertain, by citing the authorities in support of

What forms at present allowed.

Dattaca form of adoption,

and *Critrima* form.

* See general note by Sir W. Jones, appended to his translation of *Menu's* Institutes; and the text of the *Aditya Purána*, cited in *Jagannátha's* Digest, vol. iii, page 272.

† Cited in the Digest, vol. ii, page 128.

‡ Section 4, §§ 12.

§ Institutes of *Menu*, Chap. ix, §§ 168 and 169.

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each. • Regarding this particular branch of the law, there is not much difference in the doctrine of the several schools; the *Dattacachandricá* and *Dattacamimánsá*, the two chief authorities on the subject, being respected by all. The first text above cited is sufficiently explicit as to the persons who possess the right of giving in adoption; and the only exception that has been propounded by the commentators is contained in the *Dattacamimánsá*, which refers to the gift of her son by a widow during a season of calamity; and it has been made a question of doubt, whether a widow, even with the sanction of her husband, is competent to adopt a son; but her competency so to do is established by the prevailing authorities. It has been ruled, however, that in the case of an adoption made by a widow without having obtained the consent of her husband, or in which the adopted son shall not have been delivered over to her by either of his parents, but only by his brother, the adoption is invalid.* It is required that the party adopting† should be destitute of a son, and son's son, and son's grandson;‡ that the party

A widow, if in distress, may give her son in adoption.

And may adopt, with sanction of her late husband.

Qualifications of the adopting,

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* Case of Taramunee Dibia *v.* Deo Narayun Rai and another, Sudder Dewanny Adawlut Reports, vol. iii, page 387. The same principle was recognized in the case of Raja Shumshere Mull *v.* Ranee Dilraj Koonwur, vol. ii, page 169.

† It has been doubted by Mr. Sutherland, in his Synopsis, whether an unmarried person, that is, one not a *griki*, or has we would say, bachelor, is competent to adopt; but he inclines to the affirmative of the question (p. 212.) In the Precedents, vol. ii, of this work, in the case of adoption No. 1, the *pundits* expressly declared the adoption by such individual to be legal and valid, and there is certainly no authority against it. The same doubt is expressed, and the same conclusion arrived at, with respect to an adoption by a blind, impotent, or lame person.

‡ *Sounaka*, cited in *Dutt. Mim.* It has also been doubted by the author of the Considerations (p. 150), whether a man having a grandson by

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adopted should neither be the only nor the eldest son,* nor an elder relation, such as the paternal or the maternal uncle;† that he should be of the same tribe as the adopting party;‡ that he should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son. This last rule, however, applies only to the three superior classes, and does not extend to *Sudras*.§ It is a rule also, that

and of the adopted party.

Exception in case of *Sudras*.

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a daughter can adopt a son ; but there is no solid foundation on which such a doubt can rest. It must have originated in the indiscriminate use of the word "grandson" in the English translations, as applicable to the daughter's son as well as to the son's son. Mr. Sutherland, in his Synopsis, page 212, infers, and justly, that if male issue exist who are disqualified by any legal impediment (such as loss of caste) from the performance of exequial rites, the affiliation of a son may legally take place. In the Summary of Hindu Law, p. 48, it is laid down as a rule, that the insanity of a begotten son would not justify adoption by the parent; but to this and other general positions laid down in that work I cannot altogether accede : for instance, it is stated, that the *Poonah Shastrees* do not recognize the necessity that adoption should precede marriage ; that a younger brother may be adopted by an elder one ; that the youngest son of a family cannot be adopted, &c., &c., for none of which can I find authority ; though undoubtedly the whole of these positions may be just when applied to that side of India, as founded on the *lex loci*, or immemorial custom.

* *Vasishtha*, *Dutt. Nir.* and *Menu*, Ibid. ; but this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy *ipso facto* loses all claim to the property of his natural family. See Bombay Reports, case of Huebut Rao *v.* Govind Rao, vol. ii, page 75; also Elem. Hin. Law, App., pp. 82, 83.

† *Dutt. Mim.*, Sect 2, §§ 32. Sudder Dewanny Adawlut Reports, vol. iii, p. 232, *Mit.* on *Inh.*, Chap. i, Section 11, p. 12.

‡ *Menu*, Chap. ix, §§ 168.

§ *Nareda*, cited in *Dutt. Nir.*

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Widow may adopt, with sanction of kindred, according to some authorities.

when a woman adopts, she should have the consent of her husband; or according to the law laid down in some authorities, the sanction of his kindred;* that where there is a brother's son, he should be selected for adoption in preference to all other individuals; but this is not universally indispensable, so as to invalidate the adoption of a stranger.† *Dattacachandricá*, Section 1, §§ 22. In the case of Ooman Dutt, pauper, appellant *v.* Kunhia Singh, it was held, that

A brother's son should be preferred.

while a brother's son exists, the adoption of any other individual is illegal; and this is undoubtedly consonant to the doctrine contained in the *Dattacamimánsá*, but it is controverted in the *Dattacachandricá*. It would appear, however, that according to the law of Bengal and elsewhere, where the doctrine of the latter authority is chiefly followed, and where the doctrine of "*factum valet*" exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and the places where the *Mimánsá* principally obtains, and where a prohibitory rule has in most instances the

But this rule does not invalidate the adoption of a stranger.

effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion.‡ It may be held, then, that the injunction to adopt one's own *Sapinda*, (a brother's son is the first,) and failing them, to adopt out of one's own *Gotra*, is not essential, so as

* According to the *Vyavahárakoustabha* and *Mayūc'ha*, authorities of the highest repute among the *Mahrattas*, which in this respect follow the doctrine of the *Dattacachandricá*, the sanction of the husband is not requisite; but in this respect the authorities above cited differ from most others. Bom. Rep., vol. i, p. 181, and vol. ii, pp. 76 and 456. See also Elem. Hin. Law, Appendix, pp. 66, 68, 71.

† Sudder Dewanny Adawlut Reports, vol. iii, p. 144.

‡ Colebrooke, cited in Elem. Hin. Law, Appendix, pp. 74 and 80.

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to invalidate the adoption in the event of departure from the rule. It is lastly requisite, that the adopted son should be initiated in the name and family of the adopting party, with the prescribed form and solemnities.* The adoption being once completed, the son adopted loses all claim to the property of his natural family,† but he is estranged from his own family partially only. For the purposes of marriage, mourning, &c., he is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed. His own family have no claim whatever to any property to which he may have succeeded; and in the event of a son so adopted, having succeeded to the property of his adopting father, and leaving no issue, his own father cannot legally claim to inherit from him, but the widow of his adopting father will succeed to the property.‡ He becomes (with the exception above

Must be initiated in the adopter's family.

Effect of a adoption.

His consanguineous relatives are not his heirs.

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* For an enumeration of the ceremonies enjoined at an adoption, see Summary Hindu Law, p. 52, and Elements Hindu Law, page 82 *et seq;* but the exact observance of these ceremonies is not indispensable. Dig. vol. iii, p. 244, and Elem. Hin. Law, App., pp. 101, 106.

† It has been asserted by the author of the Elements of Hindu Law, that a son adopted in the ordinary way, though he cannot marry among his adoptive, yet may one of his natural relations; but I cannot find any authority for this doctrine. He seems to have inferred from the text of *Parijata*, "Sons given, purchased, and the rest, who are sons of two fathers, may not marry in either family even: as was the case of Singa and Saisira," that adopted sons not bearing the double relationship might do so; but the inference is clearly untenable. Indeed Mr. Sutherland, to whom he refers as his authority, expressly declares in his Synopsis (p. 219,) that the adopted son cannot marry any kinswoman related to his father and mother, within the prohibited number of degrees, as his consanguineal relation endures.

‡ Elem. Hin. Law, Appendix, p. 104.

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noticed) to all intents and purposes a member of the family of his adopting father, and he succeeds to his property, collaterally as well as lineally;* but excepting the case of the peculiar adoption termed *Dwyamushayuna*, he is excluded from participating in his natural father's property.† Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together; but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other schools.‡ If two legitimate sons are subsequently born, then, according to the Benares school, the property should be made into seven parts, of which the legitimate sons would take six; and according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on, in the same proportion, whatever number of legitimate sons may be born subsequently.§

Exception in the case of a *Dwyamushayuna*.

His share with a son subsequently born,

and with two or more.

A boy adopted by a widow with the permission of her late husband has all the rights of a posthumous son, so that a sale made by her to his prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity:‖ and in the case of a

Has all the rights of a posthumous son.

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* *Menu*, Chap. ix, §§ 159.

† See Precedents of Adoption, case 10, and of Sisters' Sons, &c., case 7. *Vasishtha*, cited in the *Dutt. Mim.* and *Catyáyana* in the *Dattacachandricá*.

‡ See the case of Srinath Serma *v.* Radhakaunt, and Dutt Narain Sing and others *v.* Roghoobeer Singh, Sudder Dewanny Adawlut Reports, vol. i, pages 15 and 20.

§ It is laid down in the *Dattacachandricá*, that in case of *Sudras*, if a legitimate son be subsequently born, he is entitled to an equal share only with the adopted son; and this rule prevails accordingly in the southern provinces.

‖ Case of Ranee Kishermunee *v.* Oodwunt Singh and anothers, S. D. A. Reports, vol. iii, p. 220.

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Hindu of Bengal, dying in his father's lifetime without issue, but leaving a widow authorized to adopt a son, if such adoption be made by the widow, with the knowledge and consent of her deceased husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have been born to his daughter in wedlock, no such subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.*

Example.

The above rules relate to a son adopted in the *Dattaca* form. But there is a peculiar species of adoption termed *Dwyamushayuna*, where the adopted son still continues a member of his own family, and partakes of the estate both of his natural and his adopting father, and so inheriting is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply.† It may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *Nitya Dwyamushayuna*; or otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *Anitya Dwyamushayuna*; and in this latter case, the connexion between the adopting and the adopted parties endures only during the lifetime of the adopted. His children revert to their natural family.‡ With a legitimate son subsequently born, the *Dwyamushayuna* takes half a share of his adopting father's property.§

***Dwyamushayuna* form of adoption.**

Of the *Nitya* form,

and *Anitya*.

His share with a son subsequently born.

The question as to the proper age for adoption has been much discussed; and the most correct opinion seems to be,

* Case of Ramkissen Surkheyl *v.* Srimutee Dibia, Ibid., 367. See also Colebrooke, in Elem. Hin. Law, App., p. 102.

† See the case of Raja Shumshere Mull *v.* Ranee Dilraj Koonwur, S. D. A. Reports, vol. ii, p. 169.

‡ *Dutt. Mim.*, Sec. 6, §§ 41 and 42.

§ *Dutt. Chand.*, Sec. 5, §§ 33.

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Age of adoption.

that there is no defined and universally applicable rule as to the age beyond which adoption cannot take place, so long as the initiatory ceremony of tonsure, according to one opinion, and of investiture, according to another, has not been performed in the family of the natural father.

According to the *Dattacamimánsá.*

In the *Dattacamimánsá,* the period fixed beyond which adoption cannot take place is the age of five years; and if the ceremony of tonsure have been performed within that period in the family of the natural father, the son adopted cannot become a *Dattaca* in the ordinary form, but must be considered an *Anitya Dwyamushayuna,* or son of two fathers. This can only be effected by the performance of the sacrifice termed *Putreshti,* by which the son is affiliated in both families.

And according to the *Dattacachandricá.*

In the *Dattacachandricá** the period fixed for adoption is extended, with respect to the three superior tribes, to their investiture with the characteristic cords, which ceremony is termed *Oopunayuna,* and is subsequent to that of tonsure, or *Chooracurana;* and with respect to *Sudras,* to their contracting marriage. But investiture in the one case, and marriage in the other, must be performed in the family of the adopting father. The periods fixed, however, for the investiture of the three superior tribes are different.

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* The difference of opinion with respect to this point arises from a difference of grammatical construction. The term in the original is *Chudadya,* (signifying tonsure and the rest,) which is a compound epithet termed *Buhobrihee,* which again is divided into two kinds called *tadguna* and *atadguna,* inclusive and exclusive. According to those who adopt the former construction, adoption is lawful even after tonsure; but not so according to those who adopt the latter. The former construction is adopted by *Devandabhatta;* the latter by *Nandapandita.*

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That of a Brahmin should take place when he is eight years of age, which may be construed optionally, as signifying eight years from the date of conception, or from the date of birth. That of a *Cshetrya* at eleven years of age, and that of a *Vaisya* at twelve. But there are secondary periods allowed: for instance, the investiture of a Brahmin may be postponed until sixteen years after the date of conception; that of a *Cshetrya* until twenty-two years after the same date; and that of a *Vaisya* until twenty-four years. It should be observed, however, that where this ceremony of *Oopunayuna* has once been performed, an insurmountable bar to adoption is thereby immediately created. Its effect cannot, as in the case of tonsure before the age of five years, according to the authority of the *Dattacamimánsá*, be so far neutralized as to admit of its being re-performed after the ceremony of *Putreshti*.*

Periods of investiture for the different tribes.

The authorities being entitled to equal weight in different parts of the country, the only ground of preference must be sought for in the different customs prevailing in different places. In the province of Bengal, and in the southern provinces, the more extended period should be assumed as the limit;† that being apparently consonant to

Period of adoption in Bengal and the southern provinces.

* This has been doubted by the translator of the *Dattacachandricá* and *Dattacamimánsá*, in his Synopsis at the conclusion of that work, p. 225; and he diffidently expresses his inability to settle the question, though he inclines to the negative: but independently of there being no authority in support of the affirmative of the question, the fact that investiture constitutes a second birth is conclusive against it. Adoption is permitted on the principle that the adopted son is born again in the family of his adopting father; but this cannot be where the investiture, which causes the second birth, has already been performed in the family of the natural father.

† For the doctrine as to the age of adoption according to the Southern authorities, see Elements of Hindu Law, page 75 *et seq.* and Summary ditto, p. 50.

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And in Benares. the received practice; while in Benares, the *Dattacamimánsá*, which limits the period of adoption, should for the same reason be followed. In laying this down as a rule, it may be objected, that there do not exist sufficient grounds for the establishment of its accuracy. It is proper, therefore, that the grounds of the rule should be stated. In the precedents which I have collected, there is no case bearing directly on the point. Case 2, (which is a Bengal case) does not expressly prohibit adoption after the age of five years. And in the case of Kerutnarain *versus* Musst. Bhobinesree, (the only adjudicated one for Bengal that I can find bearing on the question,*) the principle of the extended limit was fully discussed and admitted. The limitation to the age of five years is founded on a passage in the *Calicapurána*,† and the authenticity of that passage is doubtful. The *Dattacachandricá* makes no mention of it, though the *Dattacamimánsá* does. The latter being a Benares authority, it may be proper to apply the limiting principle to that province, but not to Bengal or the Dekhan, where that principle is not only not recognized, but where it is denied, and adoptions continually take place at an age far exceeding five years. There is no standard work on the subject of adoption expressly for the Bengal school; but whenever there is any difference of opinion between the *Dattacamimánsá* and the *Dattacachandricá*, the doctrine of the latter conforms to that of Bengal; for instance, as to the share to be taken by an adopted with a legitimate son.‡ Other instances might be cited. If it should be considered that the reasons here given are insufficient to warrant the conclusion arrived at, it may at least be contended, that it is open to a Bengal *pundit* to adopt either authority, and that the adoption of that which admits

Reason of the rule.

Precedents cited.

The doctrine of the *Mimánsá* preferred in Benares, and that of the *Chandricá* elsewhere.

* Sudder Dewanny Adawlut Reports, vol. i, p. 161.

† Digest, vol. iii, p. 228.

‡ *Dáyabhága*, 155.

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the more extended limit, as being the more liberal construction, could not be objected to. The author of the Considerations on Hindu Law as current in Bengal,* seems adverse to the extension of the limit. He maintains, that in the case of Gopeemohun Deb, it was the opinion of all the *pundits* who were consulted on his behalf, that proof of his being under the age of five years was indispensable. He also alludes to a remark appended to the case of Kerutnarian *v.* Musst. Bhobinesree, decided in the S. D. A.; but, with respect to the first, it may be observed, that there does not appear to have been any formal opinion actually taken; and, with respect to the second, it is not apparent from what authority the remark proceeded. The author of the Considerations lays it down as a second rule, that adoption cannot take place in any of the classes after the ceremony of tonsure shall have been performed. From what has preceded, it will appear, however, that "investiture" should have been substituted for the word "tonsure;" and that the doctrine should have been qualified by the provision, that if tonsure had been performed previously to the fifth year, it might be repeated in the family of the adopting father, the adopted son thereby becoming an *Anitya Dwyamushayana*. According to the *Muyooc'ha*, an authority of the greatest eminence among the Mahrattas, the restriction as to age relates only to cases where no relationship subsists; but when a relation, or *Sagotra*, is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family.† In Mithilá, where the *Critrima*‡ form of adoption prevails, there is no

Argument continued.

Adoption cannot take place after investiture, but may after tonsure under five years.

Among the Mahrattas, no restriction as to age of a relation.

Nor in the *Critrima* form.

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* Page 144.

† Bombay Reports, voi. i, p. 195.

‡ This form of adoption is wholly unknown in Bengal: but see note, Sutherland's Synop., p. 221, and case of Ooman Dut *v.* Kunhai Singh, Sudder Dewanny Adawlut Reports, vol. iii, p. 144.

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sort of restriction, except as to tribe; it being requisite that the tribe of the adopting father and of the adopted son be the same. There is no limit as to age, and no condition as to the performance of ceremonies;* so much so, that *Keshuba Misra*, in the *Dwaita Purishishta*, treating of this description of adoption, has declared that a man may adopt his own brother,† or even his own father. But he, as well as his issue, continues after the adoption to be considered a member of his natural family,‡ and he takes the inheritance both of his own family and that of his adopting father.§ Another peculiarity of this species of adoption, is that a person adopted in this form by the widow does not thereby become the adopted son of the husband, even though the adoption should have been permitted by the husband;|| and the express consent of the person nominated for the adoption must be obtained during the lifetime of the adopting party.¶ This relation of *Kritrima* son extends, as has been already observed, to the contracting parties only; and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting

According to which form a brother or a father may be adopted; and a *Critrima* does not lose relation to his natural family, but inherits in both.

Adopted by a widow, does not thereby become son of the husband,

and must himself consent to the adoption.

The relation does not descend.

* See the case of Kullean Singh *v.* Kirpa and another, Sudder Dewanny Adawlut Reports, vol. i, p. 9.

† The reverse of this opinion was maintained in the case of Baboo Runjeet Singh *v.* Obhye Narain Singh, Sudder Dewanny Adawlut Reports, voi. ii, page 245; but the authorities cited by the law officers in support of the doctrine laid down by them on that occasion had relation to the *Dattaca* form of adoption.

‡ Dig., vol. iii, p. 276.

§ Sudder Dewanny Adawlut Reports, vol. iii, p. 307.

|| Ibid., vol. ii, p. 27.

¶ Ibid., p. 173.

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father. He does not inherit collaterally, being ninth in the enumeration, according to *Yájnyawalcya*.*

Does not inherit collaterally.

It has already been observed, that a man who has a son, son's son, or son's grandson, is not competent to adopt a son; and it would seem to follow, by analogy, that if a man has a son, and the son of an elder son deceased, he may give the former† away in adoption, because he cannot be considered as the father of one son only; the latter also bearing towards him the relation of a son to all intents and purposes, and supplying the place of the elder one. In the *Dattacamimánsá*, there is a prohibition against the gift of a son, where there are only two; but the precept is merely dissuasive, and not peremptory.

A man having a son, and a son's son, may give the former in adoption.

Two persons cannot join in the adoption of one son. A notion seems to have prevailed, that two brothers might adopt the same individual; but this is entirely erroneous.‡ The supposition seems to have proceeded on a misconstruction of the following text of *Menu*:—"If among several brothers of the whole blood, one have a son born, *Menu* pronounces them all fathers of a male child by means of that son."§ But that text is not meant to authorize the adoption of a nephew even, by two or more brothers. The adopted son of one brother would of course offer up oblations to the ancestors of all, and so far would perform the office of a son to them also; but he would not take the estate of his adopting father's brothers, in the event of their having any nearer heir.

Two persons cannot adopt the same individual under any circumstances.

* Dig., vol. iii, p. 276.

† In this case the dissuasive precept against giving one of two sons would apply, but the adoption would nevertheless be valid.

‡ See Considerations on Hindu Law, p. 473 *et seq.*

§ Cited in Dig., vol. iii, p. 266.

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Another point which has been the subject of much discussion, is, as to whether an adopted son by the *Dattaca* form succeeds collaterally, as well as lineally; but this may now be fairly said to be set at rest, and decided in the affirmative. It is true that *Jimutavahana*, in the *Dáyabhága*, has contended that the son adopted in the *Dattaca* form cannot succeed to the property of his adopting father's relations; but the doctrine, being in opposition to the text of *Menu*, cannot be held entitled to any weight.* It should be observed, however, that a son so adopted has no legal claim to the property of a *Bandhu* or cognate relation: for instance, if a woman on whom her father's estate had devolved, adopt a son with the permission of her husband, the son so adopted will not be entitled to such estate, on his adopting mother's death. It will go to her father's brother's son, in default of nearer heirs. This point was determined in a case recently decided by the Court of Sudder Dewanny Adawlut.† It is not quite evident why a daughter's adopted son should be excluded from inheriting the estate of his adopting mother's father, while a son's adopted son's right of succeeding collaterally has been acknowledged, inasmuch as the maternal grandfather is enumerated among the kindred by all the Hindu legislators; but the reason is, that the party adopted in the latter case becomes the son of a person whose lineage is distinct from that of the maternal grandfather.

A *Dattaca* son succeeds collaterally, but not to the property of cognates.

Example.

Reason for his not succeeding to cognates property.

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* This question has been amply discussed in the Considerations on Hindu Law, p. 128 *et seq.* See also case of Shamchunder and Rooderchunder *v.* Narayinee Dibia and Ramkishen Rai, Sudder Dewanny Adawlut Reports, vol. i, p. 209.

† See the case of Gunga Mya *v.* Kishen Kishore and others, Sudder Dewanny Adawlut Reports, vol. iii, p. 128.

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The difference of opinion existing as to whether a *Dattaca* should be considered as heir of the adopter's kinsmen or not, arises from a difference in the order of enumeration in the twelve descriptions of sons; some legislators maintaining that *Menu* included the *Dattaca* among the first six, who are entitled to inherit collaterally, while others maintain that the same lawgiver ranked him among the last six, who can only inherit lineally. In the *Dwaita Nirnaya* the several opinions have been noticed, and the author of that work gives his own in favour of the *Dattaca*. In Sir William Jones's translation of the Institutes of *Menu*, the *Dattaca* is ranked among the first six; and a great majority of the *pundits* throughout the country who were consulted on the subject when it was agitated in the Supreme Court, expressed their opinion, that the *Dattaca* is entitled to inherit collaterally.* The author of the *Dattacachandricá*, according to his usual expedient of reconciling conflicting doctrines, puts the decision of the question on the character of the claimant—a criterion, it must be confessed, not very precise.†

Reason of the difference of opinion as to the *Dattaca's* right of collateral succession.

Authorities cited.

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* This question was circulated by the Court of Sudder Dewanny Adawlut to all the courts under its jurisdiction, to ascertain the law on the point from their Hindu law officers. See page 161, Considerations on Hindu Law.

† I may here be permitted to introduce the following report of a case decided on the 30th April 1821, tending to establish this point, and as generally connected with the law of adoption. The report was not given with other decisions of the Sudder Dewanny Adawlut of the same year; and from the importance of the case, it may be concluded that the omission was attributable to oversight.

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It is clear, that a man having adopted a boy, and that boy being alive, he cannot adopt another. It is written in the

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The appellant in this case was Gourhurree Kubraj, guardian of Sheopershad Chowdree, a minor, against Musst. Rutnasuree Dibia, mother of Kuroona Kant Rai, also a minor.

The suit was originally instituted by the appellant against Kashee Kant Rai, in the Moorshedabad provincial court, on the 14th of March 1814, to recover possession of a three-anna share of the *zemindaree*, Pergunnah Tahirpoor, and the independent Kismuts Talgachee, Juggunnathpoor, &c. &c., in *zillah* Rajesaye. The action was laid at Rs. 7051, the estimated annual produce.

The plaint set forth, that Rajah Mohindernarain had five sons, viz., Ramindernarain, Rubindernarain, Jadubindernarain, Munneindernarain, and Oopindernarain, of whom Jadubindernarain and the two others last mentioned, died without children. On the death of Mohindernarain, one moiety of the six-anna share in Pergunnah Tahirpoor, which constituted his *zemindaree*, descended to Anundindernarain, the adopted son of Ramindernarain and father of Sheopershad, a minor, and the other half to Bhyrubindernarain, as heir to his adopting father Raghooindernarain, son of Rubindernarain. Anundindernarain Chowdree sold a five-pie share of his three-anna portion, and retained possession of the remaining portion. Bhyrubindernarain died in 1204, B. S. leaving Jugdusuree his wife, and Bunmalee Dibia his daughter. Jugdusuree obtained possession, and was registered as proprietor of her husband's share; and in the year 1212, B. S. gave Bunmalee, when she was nine years old, in marriage to the defendant. Bunmalee died on the 27th of Phagoon 1213, B S. before she arrived at years of maturity; and Jugdusuree likewise died on the 17th of Cheyt in the same year. As Sheopershad was entitled to perform the *sraddha* and to succeed to the property left by Jugdusuree, he presented a petition to the collector to be registered as proprietor of the deceased's estate, which was opposed by the defendant, on the plea that Jugdusuree had made a gift in 1207, B. S. of the *zemindaree* and her other property to him and to his wife Bunmalee, to which he was therefore entitled : his claim was also opposed by Eshurchund, a person who represented himself to be the adopted son of the deceased, and who likewise applied for the entry of his own name. The collector rejected Sheopershad's application, and ordered the defendant's name to be entered for Jugdusuree's *zemindaree*, according to the conditional deed of gift

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Dattacamimánsá : " A man destitute of a son *(aputra)* is one to whom no son has been born, or whose son has died;

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produced by him, though contrary to the *Shasters*, and referred Sheopershad and Eshurchund to a civil suit. Eshurchund brought an action in the *zillah* court, through his guardian Gungaram Bhaduree, and obtained a decree, which was reversed on appeal by the provincial court, and his claim as adopted son rejected. This decision was subsequently affirmed by the Sudder Dewanny Adawlut, which court passed an order, on the 4th of February 1813, directing Sheopershad to prefer his claim, as heir, either in the *zillah* or provincial court, to the estate left by Jugdusuree, when it would be decided whether the deed of gift produced by Kashee Kant Rai was valid or not, according to the *Shasters*. Bunmalee Dibia was married to Kashee Kant in the year 1212, B. S. and the deed of gift produced by the defendant as having been executed by Jugdusuree in favour of himself (Kashee Kant) and his wife Bunmalee is dated the 23rd of Assar 1207, B. S. Jugdusuree was in possession of the estate during her lifetime, namely till Cheyt 1213, B. S. during which period Kashee Kant Rai (who was not competent to perform the exequial rites) had nothing to do with it, and no mention was made of the deed of gift. From the condition specified in the said deed, it appeared that the gift was made to Kashee Kant and Bunmalee Dibia, in the event of the latter becoming pregnant. It was very suspicious, and altogether unlikely that the idea of Bunmalee's pregnancy should have been entertained five years previous to her marriage, and inserted in the deed of gift. The instrument by which Jugdusuree bequeathed her property on her death to the defendant and Musst. Bunmalee is invalid, inasmuch as she is not empowered by the *Shasters* to alienate it by sale or gift, and as, moreover, Bunmalee died during the lifetime of Jugdusuree, her succession was thereby defeated. Besides, by a compromise entered into formerly between Anundindernarain, the father of Sheopershad, and Bhyrubindernarain, the husband of Jugdusuree, it was provided, that the estate and property of either of them who should die without children should go to the survivor and his heirs; so that, in every point of view, Sheopershad was entitled to Jugdusuree's property.

The defendant in answer stated, that after three of the five sons of Rajah Mohindernarain had died without children, Rubindernarain, grandfather of Bhyrubindernarain, the husband of Ranee Jugdusuree,

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for a *text of Sounaka* expresses, "one to whom no son has been born, or whose son has died, having fasted for a son,

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and Ramindernarain, grandfather (as alleged by the plaintiff) of Sheopershad, became possessed of the six-anna share of *pergunna* Tahirpoor. A moiety, or three-anna share, devolved at the death of Rubindernarain on Raghooindernarain by the law of inheritance, and on his death it went to Bhyrubindernarain, and on his dying without sons to his widow Musst. Jugdusuree. The remaining three-anna share descended to Anundindernarain, by a gift from Ranee Lukhee, widow of Ramindernarain, and a deed of compromise, alleged to have been executed by Bhyrubindernarain. The property did not go to Anundindernarain by right of adoption ; for Ranee Lukhee, after her husband's death, had in conformity to his permission, adopted in the first instance, a person named Roodurnarain, and on his death, Anundindernarain, without the permission of her husband, and in opposition to the *Shasters*, on which account she had made a gift to him of her estate. An adoption of this nature has never been recognized by the *Shasters*, by the usages of the Brahmins or other Hindu tribes. A suit was in consequence instituted in the *zillah* court between Bhyrubindernarain and Anundindernarain, and regularly carried in appeal before the Sudder Dewanny Adawlut. The *vyavastha* submitted by the Pundit of the *zillah* court, which likewise coincided with five legal opinions filed by Bhyrubindernarain, invalidated the adoption. The *zillah* judge, however, acted on the opinion expressed by other Pundits which were submitted by Anundindernarain, and passed a decree in his favour, declaring in that decree, which was dated June the 30th, 1795, that the object of Ranee Lukhee in executing a deed of gift of that nature, was to secure to Anundindernarain in some way, either by adoption or by gift, the succession to her property, and that, in the event of any dispute arising after her death on the subject of the second adoption, there might be no doubt of her property descending to Anundindernarain under the deed of gift. By the decison of the superior court, the adoption of Anundindernarain was declared illegal, and he was allowed to succeed to the property solely on the ground of the deed of gift and the compromise, the authenticity of which was not ascertained. Besides, even supposing the adoption to have been valid, the person adopted is only entitled to the property of his adopting father, and has no claim to the property of his adopting father's family or collateral relations. Sheopershad, therefore, could have no title whatever to the three-anna share of the estate in dispute. The

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&c.:"* but it seems to be admitted, that a man having a legitimate son may not only authorize his wife to adopt a son A man having a son or an adopted son,

following, he affirmed, was the true state of the case. It is the usage among Brahmins for a *Kooleen*, when he marries into an inferior family, to receive a large valuable consideration. Accordingly, in 1207, B. S. Ranee Jugdusuree, wife of Bhyrubindernarain, who was of an inferior family, having agreed to give her daughter Bunmalee Dibia in marriage to him (the defendant), who was of the *Kooleen* caste, made a gift of her *zemindaree* and other property to his wife Bunmalee Dibia and himself, with the knowledge and consent of all her family, as well as of Anundindernarain. But, in consideration of their youth, she executed an *icrarnama* in the form of a will, in favour of his (the defendant's) father, Kalee Kant Rai, empowering him to superintend and take care of the estate during the period of their minority, and died in the year 1213, B. S. Anundindernarain also lived till 1212, B. S. subsequent to the execution and registry of the deed of gift; and, had he considered himself the heir of Ranee Jugdusuree, he would, undoubtedly, have opposed the proceeding, either at the time or at some subsequent period of his life. He, however, had never done so. On the death of Ranee Jugdusuree, Gungaram Bhaduree, the plaintiff's uncle, having persuaded Benood Ram Rai, proprietor of a ten-anna share in the above *pergunna*, to collude with them, forged an *ijazutnama*, or deed of permission to adopt, and a *hibbanama* and other documents, and sued him (the defendant), first stating that Eshurchunder was the adopted son of the Ranee: but their claim was rejected, and, therefore, the present suit (fraudulently preferred on the ground that Sheopershad was the heir,

* Page 2.—There is a *vyavastha* maintaining the opposite doctrine, the authority cited for which is a verse ascribed to *Menu*, though not to be found in the Institutes: "Many sons are to be desired, that some one of them may travel to Gya." But this text obviously relates to legitimate sons. See the case of Goureepershad Rai *v.* Jymala, p. 136, vol. i, Sudder Dewanny Adawlut Reports. And Mr. Colebrooke observes, in a note to p. 42, Ibid., that the validity of a second adoption, while another son, whether by birth or adoption, is living, is a question on which writers of eminence have disagreed; that *Jagannátha*, in his Digest, inclines to hold it valid; but that the author of the *Duttacamimánsá*, a work of great authority, maintains the contrary opinion.

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may authorize his wife to adopt another, after his death, failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead;* and it has

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and entitled to the property alienated by the gift of the Ranee) was altogether inadmissible; inasmuch as the illegality of Anundindernarain's adoption invalidated the claim of Sheopershad to the property of Ranee Jugdusuree; and the Ranee having, before the birth of Sheopershad, made a gift of her property to him (the defendant) and to his wife, it could not be considered as her estate on her death. Besides, he had himself, with his own money, paid off a mortgage contracted on the estate since the time of Bhyrubindernarain, when it would otherwise have been sold. The forgery of the deed of compromise produced by the plaintiff was evident, from the circumstance of its being dated on the 11th of Bhadoon 1212, B. S. The suit about the adoption of Anundindernarain, pending between him and Bhyrubindernarain, his (the defendant's) father-in-law, was decided in the Rajshahee *zillah* court on the 13th of Assarh in the above year, afterwards in the provincial court, and lastly in the Sudder Dewanny Adawlut on the 4th of Assin 1208, B. S. Had the deed of compromise been genuine, and in the possession of Anundindernarain, he would undoubtedly have brought it forward in some court of justice. And as the cause between Anundindernarain and Bhyrubindernarain was pending till 1208, B. S. it was extremely improbable that a compromise should have been entered into in 1202, B. S. Anundindernarain also was a minor at that time, and many suits had been preferred in the civil and criminal court and in the collector's office relative to the estate between 1202 and 1213, B. S. a period of twelve years, during which Ranee Jugdusuree was alive; but no mention had ever been made of the compromise, nor had it ever been registered, or before produced.

On the death of the defendant, his wife, Musst. Rutnusuree Dibia, mother of Kuronah Kant Rai, his minor son, became his representative in the suit.

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* Case of Shamchunder and Rooderchunder, p. 209, vol. i, Sudder Dewanny Adawlut Reports, where it was established, that there may be two successive adoptions by the widows of the same man; and the case of Musst. Solukhna *v.* Ramdolal Pande and others, p. 324, vol. i.

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also been ruled, that authority to a wife to adopt, in the event of a disagreement between her and a son of the husband, failing such son.

* The plaintiff, in replication, maintained that Ramindernarain, grandfather of the minor Sheopershad, and his brother Rubindernarain, lived together as members of an undivided family. Rubindernarain died leaving a son, Raghooindernarain, his heir; and Ramindernarain died leaving his widow, Musst. Lukhee Ishuree, to whom he granted permission to adopt a son. In Kartik 1170, B. S. Raghooindernarain died leaving a widow, Musst. Sirsuttee, who with Lukhee Ishuree, the grandmother of the minor Sheopershad, enjoyed joint possession of the estate. Musst. Sirsuttee adopted Bhyrubindernarain, entered his name jointly with that of Lukhee Ishuree in the collector's office, and died in 1162, B. S.; and the grandmother of Sheopershad died after having adopted Anundindernarain according to her husband's permission, put him in possession of the estate during her own lifetime, and by means of an application effected the registry of his name instead of her own. Bhyrubindernarain afterwards instituted an action, on the ground that the adoption of Anundindernarain was illegal. By the decisions, however, of the *zillah* and provincial courts and of the Sudder Dewanny Adawlut, the adoption of Anundindernarain was held to be valid, and a decree passed in his favour. There could, therefore, be no doubt of Sheopershad's title, and of his being the *Pindadhikar*, or person entitled to perform the exequial rites of Jugdusuree and Bhyrubindernarain. As Kalee Kant Rai, father of Kashee Kant, the defendant, was adopted by Kishen Kant Rai, and according to the *Shasters* the distinction of the *Kooleen* caste is lost on the adoption, and as the dignity of the ancestors of Mohindernarain (who were Rajahs) was superior, the allegations of the defendant relative to Jugdusuree having given her property to him on his marriage with her daughter, in consideration of his rank, were evidently false, inasmuch as from the time of the ancestors of Mohindernarain, Ramindernarain, and Anundindernarain, connexions had subsisted between them and the *Kooleen* Brahmins. No one ever gave his whole estate to his daughter and son-in-law; but it is both the law and usage, that if a person dies without male issue, his estate will not devolve to his daughters, or daughters' sons, but only to the descendants from the same grandfather. In accordance with this custom, on the death of Indernarain Rai without male issue, his estate did not go to Ramsingh, his daughter's son, who was alive, but to the persons descended from the same grandfather as himself. The truth of all

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then living, will not avail; though authority to adopt, in the event of that son's death, would be valid.* It is a disputed

these representations will be established on inquiry. If the father of Sheopershad had been aware of the gift alleged by the defendant, he would certainly have opposed it. It is singular that the deed of gift declares, that the gift is made for the performance of exequial ceremonies, and stipulates that Ranee Jugdusuree shall, during her lifetime, retain possession of the above estate, and have the power of alienation by sale or gift. As, therefore, the Ranee enjoyed possession of the estate, and retained the power of disposing of it by gift or sale; and did, subsequently to the execution of the deed of gift, give, in the exercise of her proprietary right, *dewotter* and *bruhmoter* lands to many persons, and the donee did not obtain possession of the lands given to him, it did not clearly appear with what view the will in favour of the defendant's father was executed, or what law legalized a conditional gift of the above nature, or how, Bunmalee Dibia having died childless in the lifetime of her mother, the condition relative to the performance of exequial ceremonies could hold good.

The rejoinder of Rutnusuree Dibia set forth, that as both the donor and the donee were dead, and the property given had descended as an hereditary estate, the claim of any person thereto was inadmissible according to the *Shasters;* and that her son, as the *Pindadhikar* of Bunmalee Dibia, was undoubtedly entitled to her property.

On the 13th of June 1817, the second judge of the provincial court dismissed the claim with costs, on the ground of the *vyavastha* submitted by the *pundit* of the court, which declared that an adopted son was entitled to the property of his adopting father, not to that of his adopting father's collateral relations; that a woman had not the power to adopt a second person on the death of an individual whom she had previously adopted, with her husband's permission; and that, therefore, Anundindernarain, and consequently Sheopershad, were not entitled to the property in dispute; and that the deed of gift executed by Jugdusuree in favour of Bunmalee Dibia and Kashee Kant, her daughter and son-in-law, was valid.

* Case of Musst. Soolukhna *v.* Randoolal Pande and others, vol. i, p. 325.

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point, whether a widow having with the sanction of her husband, adopted one son, and such son dying, she is at liberty

But whether she can without such sanction, is disputed.

The appellant being dissatisfied with this decision, appealed to the Court of Sudder Dewanny Adawlut, laying his claim at Rs. 15,151, three times the *sudder jumma* of the lands in dispute.

Eshurchunder Rai, the person claiming to have been adopted by Ranee Jugdusuree, presented a petition to the following effect:

"The suit instituted by Gungaram Bhaduree, your petitioner's guardian, against Kashee Kant, to effect the reversal of the acting collector's order for the registry of Kashee Kant's name as proprietor of a three-anna share in *zemindaree* Pergunnah Tahirpoor, was decreed by the judge of *zillah* Rajshahye. This decision was, however, reversed in the provincial court, and the order of the provincial court was affirmed on the 4th of February 1813, by W. E. Rees, Esq., formerly acting judge of the Sudder Dewanny Adawlut. On your petitioner making frequent applications for redress to the former judges of this Court, he was informed by Mr. Harington, that when the cause of Sheopershad Chowdree came before the court, they would take into consideration your petitioner's case, and decide upon it. As your petitioner's adoption is established by the papers in the case of Sheopershad *v.* Kashee Kant, (No. 1779) your petitioner hopes, that when the above cause comes before you, you will take into consideration the present petition, and the papers filed on the former trial, as well as the petitions for a review, and the *vyavasthas* of the *pundits* of this court filed in the cause of Ranee Siromunee and others, and afford him redress."

The case having been brought to a hearing before the second judge, (C. Smith,) all the pleadings and exhibits of the parties were perused, as well as two petitions presented by Eshurchunder Surma, two *vyavasthas* of the *pundits* of this Court, one in the case of Bijia Dibia appellant *v.* Unnapoorna Dibia, respondent, the other in the case of Shamchunder Chowdree, and Rooder Chunder Chowdree, appellants *v.* Narainee Dibia Chowdrain and Ramkishore Rai, respondents, and the interrogatories of this court to the *pundits* aforesaid; the papers of the Rajshahye *zillah* court, the provincial court, and the Sudder Dewanny Adawlut in cause, (No. 846) of Gungaram Bhaduree, guardian of Eshurchunder Surma, appellant *v.* Kashee Kant Rai, respondent, and the decrees passed by all those three courts therein. Copies of two *vyavasthas* of the *pundits* of this court filed by the

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to adopt another without having received conditional permission to that effect from her husband. According to the doc-

appellant's *vakeel*, and the proceedings in three different suits, viz., Bijia Dibia, appellant *v.* Unnapoorna Dibia, respondent; Sohun Lal Khan, appellant *v.* Ranee Siromunee, respondent; and Eshurchunder Paul and others, appellants *v.* Kishen Govind Sein, respondent.

The *vyavastha* of the *pundits* in the case of Shamchunder and Rooderchunder, delivered on the 21st of August 1807, was to the following effect:

Q. Subsequently to the death of Kishen Kishore, his senior widow had adopted Nundkishore as a son, and, on the death of the son so adopted, the second widow of the said Kishenkishore adopted an individual called Ramkishore, who is still living: under these circumstances, Joogulkishore, a person adopted by Kishengopaul, the uterine brother of Kishenkishore, and his half brother Luchminarain's two sons, Shamchunder and Rooderchunder, claim the property left by Nundkishore and Kishenkishore: Now supposing the adoption of both the sons to have been proved, in this case, which of the claimants is or are entitled to inherit the property of Kishenkishore and Nundkishore? and does an adopted son succeed collaterally as well as lineally?

R. The property, whether consisting of moveables or immoveables, belonging to Kishenkishore, deceased, who left no issue of the body, will devolve on the son whom his younger widow had adopted according to the mode prescribed by law. The uterine son adopted by Kishenkishore's brother and his half brother's sons have no right of succession. The property of the deceased Nundkishore, in default of issue of his adopting mother, will devolve on the adopted son of his stepmother whom she adopted with her husband's sanction, provided he be endued with the requisite qualities, and able to benefit his parents by performing the *(Nitya)* indispensable and fixed observances, *(Nimittika)* casual rites, *(Camya)* supererogatory works (which are performed at pleasure, or through the desire of some advantage), *(Eesta)* essential ceremonies, as ablution, investiture, &c. *(Poortta)* acts of pious liberality, as digging a well, planting a grove, building a temple, &c., and so forth, prescribed to his own tribe. In this case, the surviving adopted son (of the second widow) being a nearer *sapinda* to the deceased son adopted (by the eldest widow) than the other relations who claim, he will succeed exclusively to the property, and the kinsmen will have no

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trine of the *Dattacamimánsá*, the act would clearly be illegal; but *Jagannátha* holds that the second adoption in such

Doctrine of *Jagannátha.*

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claim. This opinion is consonant to the doctrine of *Menu*, *Gautama*, and *Boudháyana*, the first of whom holds the first rank among legislators; and the doctrine is also consonant to the *Munwartha Mooktavuli*, *Dattacamimánsá*, *Vivádabhangárnava*, *Ratnácara*, and other authorities.

Authorities.—The text of *Devala* cited in the *Dáyatatwa* and other tracts: "All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten." The passage of *Yájnyawalcya* cited in the *Dáyatatwa* and other law books: "The wife and the daughters, also both parents, brothers likewise."

"Of him who leaves no son, the father shall take the inheritance, or the brothers."—*Menu*. The text of *Vrihaspati* cited by *Raghunandana* and others:—"*Menu* holds the first rank among legislators, because he has expressed in his code the whole sense of the *Vedas*: no code is approved which contradicts the sense of any law promulgated by *Menu*." The texts of *Menu* laid down in the *Ratnácara* and other tracts:—"Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs." "*Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus*; among these twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals: the result is, that, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas*, and, as heirs, they succeed to the heritage of their collateral relations, on failure of male issue, as well as to the estate of their father." This is the explanation of *Cullúcabhatta*. The following texts are laid down in the *Ratnácara* and other tracts.—*Gautama*. "The son begotten by a man himself in *lawful wedlock*, the son of a wife *begotten by an appointed kinsman*, a son given; a son made by adoption, a son of concealed birth, and one rejected by his natural parents, are sons who inherit property. The son of an unmarried girl, the son of a pregnant bride, a son by a twice-married

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case would be valid, the object of the first having been defeated. According to the authorities which are followed in Ben- Of Bengal.

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woman, the son of an appointed daughter, a son self-given, and a son bought, claim the family of their adopting fathers."

Boudháyana:—Participation of wealth belongs to the son begotten by a man himself *in lawful wedlock*, the son of his appointed daughter, the son begotten on his wife *by a* kinsman *legally appointed*, a son given, a son made *by adoption*, a son of concealed birth, and a son rejected *by his natural parents.* Consanguinity, *denoted by a common family appellation*, belongs to the son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of a priest by a *Sudra.*" Although *Jimutavahana, Raghunandana*, and others, explaining the text of *Devala* cited in the *Dáyabhága*, has not reconciled the dispute in regard to the given son and the rest being heirs to collaterals or otherwise, yet it should not be therefore supposed that the given son has no right of collateral succession. The difference of opinion may be reconciled by referring to the distinction of the adopted son being *(Sugoona)* endued with good qualities, or *(Nirgoona)* not so enduced. This is the doctrine contained in the *Ratnácara* and other authorities ; and it must be admitted that the given son and the rest who are endued with good qualities, are entitled to succeed both to the adopting father and his kinsmen.

" It is also proper to affirm, as intended by that expression, that sons given and others, being virtuous, are entitled to the inheritance and so forth, in preference to a son by a twice-married woman or the like, if he be destitute of good qualities ; but if all be destitute of good qualities, he who is superior as nearest allied by birth, shall take a full share of the paternal estate, and the rest shall have the portions allotted to them in the *Brahmapurana* and other works. The maintenance directed must consist in the receipt of such a share ; else the *seeming* contradictions in the texts of *Menu* and others, and of *Yájnyawalcya* and the rest, could not be well reconciled. But some argue, from the concurrent import of the text of *Devala*, that the text of the *Brahmapurana* also relates to sons given and the rest, who are inferior in class to their adoptive fathers.—*Vivádabhangárnava.*

The *vyavasthá* in the case of Bijia Dibia against Unnapurna Dibia, was to the following effect :

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gal and Benares, a woman is competent, after the death of her husband, to adopt a son, provided he gave her permission And Benares.

Q. Tarnee Choudhrain having, at her husband's death, taken possession of his entire property, real and personal, selected for adoption a boy named Kalikant, with her late husband's sanction. It appears from the deposition of a witness Bhowanishunker, adduced by Kalibhairub and the said Tarnee (who were defendants in this cause) that Kalikant died previously to the celebration of the ceremonies prescribed for adoption; but it appears from the statement of the plaintiff Bijia Dibia, that the boy died subsequently to his adoption. A few years after his death, the said Tarnee assigned over all the property which she held in her possession to her junior daughter's son (Kalibhairub), while her senior daughter was living and had a daughter. Subsequently the senior daughter was delivered of a son, who laid claim to a moiety of the property disposed of as above stated. Under these circumstances, was the said Tarnee, according to the law of Bengal, competent to give away all her husband's property to her daughter's son, while she had another daughter living, and is the deed of gift in such case valid and binding? Supposing the adoption of Kalikant to have been actually made in this case, was she (the said Tarnee) competent, after the death of such adopted son, to dispose of her adopted son's property by deed of gift in favour of her daughter's son?

R. A widow, without sanction of her husband's representatives, is incompetent to make a gift of his property which had devolved on her by right of inheritance, and the deed of gift which she made cannot be considered as valid or binding. No adopting woman is allowed to dispose of her adopted son's property which had devolved on her at his death, by a deed of gift in favour of one heir, while there is a possibility of the birth of another. This opinion is conformable to the *Dáyabhága*, *Dáyanirnaya*, *Dáyaruhasya*, *Vyavasthárnava*, *Dáyatatwa*, *Dáyanirnaya*, and other authorities current in Bengal.

Authorities.—" But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it." Thus *Cátyáyana* says : " Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." " Abiding with her venerable protector :" that is, with her father-in-law, or others of her husband's family, let her enjoy her

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And western provinces.

to do so during his lifetime; and, according to the law of the western provinces, with the sanction of the husband's

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husband's estate during her life; and not, as with her separate property, make a gift, mortgage, or sale of it at her pleasure.—The *Dáyabhága*. It is laid down in the *Dáyanirnaya*, that "no widow is competent to make a gift, or mortgage, or sale of her husband's property, except for the sake of performing his exequial rites, or other necessary purpose; and she residing with her husband's family, is entitled to consume only such portion of his estate as may suffice for her subsistence.

For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth.—The *Bharata*. By the word "waste" it is meant, that a woman cannot make a gift, sale, or other alienation of her husband's property at her pleasure.—The *Dáyaruhasya*.

"The property of a person dying, leaving neither son, son's son, nor son's grandson, goes to his virtuous widow; but she cannot make any alienation, as sale or the like, of such property, excepting for the purpose of promoting her husband's spiritual benefit by giving a part of it, or for the purpose of saving her own life."—The *Vyavástharnava*.

The text of *Náreda* laid down in the *Dáyarahasya* :—"Every sort of contract made by a woman, not in a time of distress, is null and void, particularly the gift, mortgage, and sale of the house and field."

The word "wife" is employed as a term of general import: and implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance.—The *Dáyabhága*.

The following passage is cited in the *Dáyabhága* and *Dáyarahasya*:—

"They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

The second judge recorded his opinion on the 2d of January, 1821, in these terms:—

"I am of opinion that neither of the parties in the present case are entitled to the property left by Ranee Jugdusuree, inasmuch as it has been established that Eshurchunder Chowdree, the appellant in the cause (No. 846), is the rightful heir. The proofs in favour of

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kindred, after his death; these authorities contending, that although a woman cannot of herself perform the ceremonies

Reason of the doctrine.

such a conclusion are fully detailed in my proceeding of this date. If, in concurrence with me, the Court, after admitting a review of judgment in case No. 846, reverse the decisions of this Court, and of the provincial court, and affirm the decree of the Rajshahye *zillah* court, it will be necessary to affirm the decree passed by the Moorshedabad provincial court in this case. If, however, on the contrary, they uphold the decree passed by this Court on the 4th of February 1813, I consider the title of Sheopershad Chowdree (the appellant) to be, according to the *Shasters*, undoubtedly superior to that of Kasheekant Rai, the respondent's father. For Kasheekant Rai only stood in the relation of a son-in-law, which ceased on his wife's dying without children during her mother's lifetime, and his claim under the conditional deed of gift is altogether inadmissible according to the law of inheritance; inasmuch as the condition was cancelled by the death of the person on whom the fulfilment was enjoined, and on failure of Ranee Judgusuree's own and adopted children, Sheopershad Chowdree, the appellant, appears the only person who has any title to succeed as heir." Under these circumstances, the second judge recorded his opinion, that the Court should either admit a review of judgment in EshurchunderChowdree's case, reversing the decrees of this, and of the provincial court, and affirming the decree of the Rajshahye *zillah* court, dated July the 12th, 1808, and uphold the decision of the first judge of the Moorshedabad provincial court, dated June 13th, 1817, dismissing Sheopershad's claim, and making the costs of all courts payable by the parties respectively; or that they should reject the application for a review in case No. 846, and, affirming this Court's decree dated the 4th of February 1813, should reverse the decision of the first judge of the Moorshedabad provincial court, and award to Sheopershad Chowdree a three-anna share of *zemindaree pergunnah* Tahirpoor, with mesne profits for the period during which it had been in the possession of Kasheekant Rai, charging the costs of both courts to the respondent.

The case was next brought before the third and officiating judges (S. T. Goad and W. Dorin.) Their proceeding of the 8th of February was to the following effect:

"It appears that the appellant lays claim to a three-anna share in the *zemindaree* of *pergunnah* Tahirpoor, which was in the possession of

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requisite to adoption, yet that there is no objection to her calling in the assistance of learned Brahmins, as is practised

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Ranee Jugdusuree, who died in 1213, B. S. The Ranee was seized of the three-anna portion in dispute on the death of her husband Bhyrubindernarain in the year 1204, B. S., who left no male issue and only one daughter. The daughter also died at the age of nine or ten years, after her marriage with the late Kasheekant Rai, the respondent's husband. The appellant maintains, that the share in dispute, being the estate left by Bhyrubindernarain the husband of Jugdusuree, descends to his heir; and as he is the son of Anundindernarain, Bhyrubindernarain's uncle, who was adopted by Ranee Sirsuttee, and was likewise the second adopted son of Ranee Lukhee, he is entitled to it according to the law of inheritance. The respondent contends, that Ranee Jugdusuree transferred the above estate to her daughter and the husband of that daughter by a deed of gift executed on the 23d of Assarh 1207, B. S., under the expectation that her daughter would bear a son, and stipulating that she (the donor) should remain in possession of the lands during her lifetime, as she accordingly did for six or seven years, and she opposes the claim preferred on the grounds of hereditary right by the appellant.

1st.—Because the adoption of Anundindernarain by Ranee Lukhee, the wife of Ramindernarain, had not taken place according to the *Shasters.*

2d.—Because, even if the adoption of Anundindernarain had been legal, the appellant's claim to succeed as heir to the estate of Bhyrubindernarain and Ranee Jugdusuree was inadmissible according to the *Shasters*, inasmuch as he could not claim relationship with the husband of Ranee Jugdusuree through the adoption of his father.

But with respect to the objections urged by the respondent to the legality of Anundindernarain's adoption by Ranee Lukhee, in conformity to the permission of her husband, it is only necessary to state that Anundindernarian died in 1212, B.S., till which time he was in possession of his adopting father's estate, and that it appears from a decree passed by this Court on the 28th of September 1801, in the case of Ranee Jugdusuree, appellant *v.* Anundindernarain, a minor, respondent, that several objections raised to the adoption of Anundindernarain were overruled at the time by this Court, and the adoption declared to be valid. Bhyrubindernarain, moreover, the husband of the appellant upon that occasion, admitted the legality of the adoption. Adverting

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by *Sudras* on similar occasions. But according to the doctrine of *Vachespati,* whose authority is recognized in Mithilá, Doctrine of the Mithilá school.

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to the foregoing circumstances, the Court do not consider that the respondent is authorized, after so great a lapse of time, now to call in question the legality of Anundindernarain's adoption. And as it is evident, from several former *vyavasthás,* that the deed of gift executed by Ranee Jugdusuree for her husband's estate, to the possession of which she had succeeded on his dying without male issue, is perfectly invalid, it only remains to ascertain whether now the appellant is, according to the Hindu law, entitled to the estate in dispute as heir."

A copy of this proceeding was accordingly ordered to be laid before the *pundits* of the Court, together with the genealogical table furnished by the appellant, to enable them, after a due consideration of their contents, to submit within a fortnight a *vyavasthá* consonant to the Hindu law as current in Bengal, in reply to the following question.

Q. If the deed of gift produced by the respondent be illegal, and at the death of Jugdusuree her husband's heirs had the right of succeeding her, in this case, is the appellant, according to the law of Bengal, entitled to the property in question by right of representation or otherwise ?

R. Although Bhyrubindernarain should have died leaving no issue but a daughter, and his property should have been enjoyed by his widow Jugdusuree during her life, and the deed of gift (produced by the respondent) of all her property in favour of her daughter and her husband be illegal, yet on her demise, her property, even though it be subject to the succession of her husband's heirs, will not devolve on the appellant ; for he cannot claim it by right of representation, as he being the son of Anundindernarain, the second adopted son of Lukhee Dibia, does not hold the rank of *Sapinda.* A person according to law may desire his wife to adopt his son, but neither by law nor custom can he direct her to adopt one, and after his death another. The second adoption by the widow must be considered as illegal, and the adopted son cannot thereby rank in the relation of a *Sapinda ;* and it follows, *a fortiori,* that the appellant has no tie of relationship with the deceased, when his father is debarred from that right. It appears in the question, that Bhyrubindernarain acknowledged the adoption of Anundindernarain ; and the Court, having rejected the

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a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the *Dat-*

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objections expressed on the subject, admitted the adoption to be good and legal. The ruling authority is independent, and may act according to its pleasure; but according to law, the second adopted son can be entitled to inherit the property of the individual only by whom he is adopted, and cannot inherit the property of his adopting parent's *Sapindas*. This opinion is consonant to the *Dattacamimánsá*, *Dattacachandrica*, *Vyavahâramatricá*, and other authorities, as current in Bengal.

Authorities.—The texts laid down in the above authorities: "By a man destitute of a son only, must a substitute for the same always be adopted: with some one recourse *(Yasmattasmat Prayatnátus)* for the sake of the funeral cake, water, and solemn rites." "The funeral cake:" the "*Sradha*, or funeral repast." "Water:" that is, the presenting water in the two united palms, and so forth. "Solemn rites:" meaning rites in honour of the deceased, cremation and the like. These are the cause *(hetu.)* The reason, occasioning the adoption, is the cause. This, from being used in the singular number, shews that these ceremonies collectively are the cause, and not individually; and consequently, the meaning is, that there is not a distinct affiliation, severally for each; but one adoption only, on account of the whole: for, on default of a son, the failure of the oblation of food and other rites is the consequence."—The *Dattacamimánsá*.

As, in their proceeding of the 8th of February 1821, the Court did not require the *pundits* to give an opinion as to the legality or illegality of the adoption of Anundindernarain, they were directed to refrain from all consideration of the merits of that question; and taking for granted that it was legal, and that Anundindernarain was the adopted son of Ranee Lukhee, wife of Ramindernarain, to submit, within three days, a specific answer to the question proposed in the proceeding of the above date. It was added, that the Court would again take into consideration what was stated in their former *vyavasthá* relative to the adoption of Anundindernarain, after their delivery of the second *vyavasthá*. On the 21st of March 1821, the required reply was submitted, and was to the following effect:

"Supposing the Court to determine that the adoption of Anundindernarain by Ranee Lukhee, the widow of Ramindernarain, was valid, yet,

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taca form; and to this prohibitory rule may be traced the origin of the practice of adopting in the *Critrima* form, Of the

as it was a second adoption, he (Anundindernarain) could not be considered a *Sapinda* of Bhyrubindernarain, nor *a fortiori* could his son Sheopershad be considered a *Sapinda* of the said Bhyrubindernarain. Therefore, if, after the death of Ranee Jugdusuree, the widow of Bhyrubindernarain, the property which had devolved on her is to descend to her husband's heirs, Sheopershad cannot have any right of succession."

As it appeared that the *pundits* had still not given an explicit reply to the question propounded by the Court in their proceeding of the 8th of February, they were directed to give their opinion *de novo*, taking for granted that the adoption of Anundindernarain was valid and unobjectionable in every respect, and as if Anundindernarain were the sole adopted son of his adopting father; and the following was the purport of the third *vyavasthá*, submitted on the 3d of April 1821: That if Anundindernarain was the sole adopted son of his adopting father, and there was otherwise no question as to the legality of his adoption, in such case he must be considered as a member of the *Gotra* of his adopting father, and legally entitled to the property of his adopting father's *Sapindas;* and in the event of there being no nearer *Sapinda* to Bhyrubindernarain than the appellant Sheopershad, in such case the said appellant must be considered entitled to the estate. The *pundits'* opinion proceeded in the following manner:— This opinion is conformable to *Menu*, although the Court directed that our *vyavasthá* should be delivered according to the law of Bengal; and of all the authorities, the *Dáyabhága* is there most prevalent: and, although it is the opinion of *Jimutavahana*, quoting the text of *Devala*, and adopting his order of enumeration, that the son affiliated in the *Dattaca* form is not an heir of collateral relations *(Sapindas, &c.,)* nevertheless, as many *vyavasthás* have been delivered in the Court establishing the adopted son's collateral succession according to the law promulgated by *Menu*, this opinion is delivered according to the same law.

Authorities.—Menu: "Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, *except to their* own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten *in the manner before mentioned*, a son given to him, a son made or *adopted*, a son of concealed birth, *or whose real father cannot be known*, and a son

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Critrima form. which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer

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rejected *by his natural parents*, are the six kinsmen and heirs." Commentary on the text of *Menu* by *Balambhatta:* "*Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus;* among those twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals: the result is, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas;* and as heirs, they succeed to the heritage of their collateral relations, on failure of male issue." The text of *Menu* laid down in the *Dáyabhága*, *Dáyatatwa*, *Dáyacramasangraha*, and other authorities: "To the nearest kinsman *(Sapinda)* the inheritance next belongs."

On the receipt of the above *vyavasthá*, the Court observed, that from this *vyavasthá* it appeared, that in consequence of the death of Ranee Jugdusuree, widow of Bhyrubindernarain, without male issue, in 1213, B. S., her husband's estate, which had been enjoyed by her during her lifetime, would descend to her husband's nearest heir; and, supposing Anundindernarain to have been the adopted son of Ramindernarain and Ranee Lukhee, and a member of the family, that Sheopershad, the original plaintiff in the present cause, would succeed hereditarily as a *Sapinda*. In concurrence, therefore, with the opinion expressed by the second judge, they passed a decree in favour of the appellant's claim, reversing the judgment of the Moorshedabad provincial court, and making the costs of both courts payable by the respondent. By the decree, possession of the three-anna share in dispute was awarded to the appellant, with mesne profits from the date on which the suit was instituted till put in possession. The following observations were introduced into the final decree.

It must be remembered that the proceeding of this Court under date the 8th of February last, declared the respondent disqualified to call in question on the present occasion the legality of the adoption of Anundindernarain, the appellant's father, inasmuch as the legality of that transaction had been admitted, and recognized by a decree passed by the Sudder Dewanny Adawlut on the 28th of September, 1801, (which corresponds with 1208, B. S.) in the case of Ranee Jugdusuree, appellant *v.* Anundindernarain, respondent. It appears, moreover, that Anundindernarain was adopted in 1200, B. S. by Ranee Lukhee, and enjoyed possession of his adoptive father's estate till his own death in 1212, B. S. when he was succeeded by his son, who, as heir, continued

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of the adopting, and the consent of the adopted party. It is natural for every man to expect an heir, so long as he has

in possession till the institution of the present suit in 1220, B. S. The same objection now urged to the adoption was preferred on the former trial, viz., that the adoption, by the wife of any *zemindar*, of a second son, after the death of a previously adopted individual, was invalid. Two of the soundest and most learned *pundits* of the day, however, viz., those of the Tirhoot and Nuddea *zillah* courts, who were called on to submit their opinions on the subject, pronounced, in concurrence with the *pundit* of the Rajshahye *zillah* court, the adoption to have been a legal transaction; and as the former judges of this Court in 1801, by their decree admitted and decided on the legality of Anundindernarain's adoption in the face of the alleged objection, the Court was of opinion that the above mentioned decree, and the long lapse of time, does not leave the question of law open to their investigation. From the former decree of this Court, the grounds on which the judgment pronounced on that occasion was formed cannot be ascertained. But it is doubtful whether the former Court considered the adoption of Anundindernarain as a second adoption effected by Ranee Lukhee without permission from her husband, and legalized it proceeding on the *Ijazutnama* obtained by her from her husband, although it specified no permission for adopting a second person, or construing the tenor of the *Ijazutnama* to imply a tacit consent to the adoption of a second, on the death of the first son, which frustrated and nullified the object of the adoption, or whether they considered that the ceremonies of adoption had not been completely fulfilled in the case of the first son; for he died a few months afterwards, and, according to the testimony of several witnesses, before he had gone through the ceremonies of investiture. Yet although these circumstances have not been detailed, it is evident that by that decree the adoption of Anundindernarain, which it must be observed is nowhere described therein as a second *adoption*, was declared legal after a due consideration of all the objections urged, and he was pronounced a member of the family. The question of law, therefore, is quite irrelevant to the present case. The *Shasters* were merely consulted to ascertain whether the appellant Sheopershad, being descended from the same paternal grandfather, was entitled by the law of inheritance, to the estate in dispute; and the Court, in deciding that he is so entitled, have been guided by the above legal opinions and the *vyavasthá* submitted by the *pundits* in the case of Shamchunder and

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Reason of its prevalence in Mithilá.

life and health; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithilá, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and therefore less likely to be frustrated by the impending dissolution of the party desirous of adopting.

Sanction of the husband not requisite

It is an universal rule in Bengal and Benares, that a woman can neither adopt a son, nor give away her son in adoption, without the sanction of her husband previously obtained; but it does not appear that the prohibition in Mithilá, which prevails against her receiving a son in adoption according to the *Dattaca* form, even with the previous sanc-

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others, appellants *v.* Narainee Dibia, respondent. There are certain other points which the Court consider it advisable to notice here.

1st.—The authorities recited in the first *vyavasthá* submitted in this cause do not affect the adoption of two sons by one wife of a deceased person, or even a second adoption generally; nor is such an allegation supported by the tenor of former *vyavasthás*, furnished by the *pundits* in the cases of Shamchunder and other appellants *v.* Narainee Dibia, respondent; and Goureepershad Chowdree, appellant *v.* Mussummaut Jymala, respondent.

2dly.—The respondent's *vakeel*, after the *vyavasthá* was submitted, and while the cause was still pending, only contended that the adoption was illegal, inasmuch as it had taken place without the consent of the husband.

3dly.—In the proceeding of this Court, and in the question propounded to the *pundits*, only the word "adoption" was at first mentioned: the word "second" was subsequently added at the request of the respondent's *vakeel*, as it was thought that it would not materially affect the decision. It was, however, mentioned, that according to the evidence, it was doubtful whether the ceremonies of adoption in the first case were regularly fulfilled.

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tion of her husband, he being dead, extends to her receiving a boy in adoption according to the *Critrima* form; and the son so adopted will perform her obsequies, and succeed to her peculiar property, though not to that of her deceased husband.* It is not uncommon in the province of Mithilá for the husband to adopt one *Critrima* son, and the wife another.

in this form of adoption.

The husband may have one *Critrima* son, and the wife another.

I have laid it down as a rule, that in the present age, adoption is allowable only in the *Dattaca*, *Dwyamushyuna*, and *Critrima* forms; but I find, on reference to the Elements of Hindu Law, that a question was agitated as to the admissibility of the *Crita*, or son bought. The point was much canvassed, and gave rise to a protracted controversy between two of the most eminent scholars of the day;† and there is a case in the Sudder Dewanny Adawlut Reports,‡ in which the claimant was alleged to be of the *Paunerbhava* class,§ and in which in all probability the claim would have been adjudged, had it been proved to be customary for sons of that description to succeed. Although, therefore, it may be asserted, that generally speaking, there are only three species of adoption allowable in the present age, yet the rule should be qualified, by admitting an exception in favour of any particular usage which may be proved to have had immemorial existence. Thus it appears that the *Goswamis*, and other devotees who lead a life of celibacy, buy children to adopt them in the form termed *Crita*, or son bought; and that the practice of appointing brothers to raise up male

Of the *Crita* son.

Of the *Paunerbhava*.

The *Goswamis* adopt in the *Crita* form.

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* Suth. Synopsis, note 5, p. 222.

† See Elements Hindu Law, App., p. 107 *et seq.*

‡ Vol. i, p. 28.

§ See *Mitac.*, Chap. i, Sect. 2, §§ 8.

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Of the *Cshetraja.*

issue to deceased, impotent, or even absent husbands still prevails in Orissa.* The son so produced is termed *Cshetraja*, or son of the wife; and doubtless these several sorts of subsidiary sons should be held entitled to the patrimony of their adopting fathers, in places where the *lex loci* would justify the affiliation.† In former times, it was the practice to affiliate daughters, in default of male issue; but the practice is now forbidden.‡ The other forms of adoption enumerated by *Menu*§ appear to be wholly obsolete in the present age. Any discussion, therefore, of their relative merits would be foreign to the purpose of this publication.

Other forms obsolete.

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* Note to Dig., vol. iii, p. 276.

† See note, S. D. A. Reports, vol. ii, p. 175.

‡ *Jimutavahana*, cited in the Digest, vol. iii, p. 493.

§ Institutes, Chap. IV, §§ 159 and 160.

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CHAPTER VII.

Of Minority.

Agreeably to the Hindu law, as current in the Benares and Mithilá schools, minority is held to last until after the expiration of sixteen years of age;* and according to the doctrine of Bengal, the end of fifteen years is the limit of minority.† *Age of minority.*

A father is recognized as the legal guardian of his children, where he exists; and where the father is dead, the mother may assume the guardianship:‡ but where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarily subject to the control of her husband's relations: and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her, an elder brother of a minor is competent to *Of guardians. Of the father's guardianship. Of the mother's.*

* "Until the minors arrive at years of discretion:" in the sense of restriction, before they attain their seventeenth year. The *Retnácara.* See Dig., vol. iv, p. 243. According to Colebrooke, sixteen years must be completed.—El. Hin. Law, App., p. 208.

† See Annotations on the *Dáyabhága*, p. 58; and Digest, vol. i, p. 300.

‡ And this has been held to include the stepmother, whose right of guardianship was declared to be superior to that of the minor's paternal uncle.—Bombay Reports, vol. ii, p. 144.

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Of the paternal relations. assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity, but the appointment of guardians universally rests with the ruling power.*

And of the maternal. Their appointment vested in the ruling power.

Guardianship of a female; The guardianship of a female (whether she be a minor or adult) until she be disposed of in marriage, rests with her father: if he be dead, with her nearest paternal relations.† After her marriage, a woman is subjected to the control of her husband's family. In the first instance, her husband is her guardian: in default of him, her sons, grandsons, and great-grandsons are competent to assume the guardianship; and in default of them, her husband's heirs generally, or those who are entitled to inherit his estate after her death, are competent to exercise the duties of guardian over herself and her property. On failure of her husband's heirs, her paternal relations are her guardians; and failing them, her maternal kindred. In point of fact, females are kept in a continual state of pupilage.

during coverture,

and in widowhood.

The ruling power is the supreme guardian of all minors. The ruling power is in every instance, whether the natural and legal guardians be living or dead, recognized to be the legitimate and supreme guardian of the property of all minors, whether male or female:‡ and it

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* Dig. iii, 544, and Elem. Hindu Law, App., 202.

† See App., Elem. Hindu Law, pp. 22 and 204.

‡ Thus the property of a woman, and the goods of a minor, falling into the king's power, should not be taken by him as owner: this has been already noticed. But it may be here remarked, that the property of a minor should be entrusted to heirs, and the rest *appointed* with his concurrence; or if the infant be absolutely incapable of discretion,

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and it may here be mentioned, that agreebly to the regulations of Government, the state of minority is held to extend to the end of the eighteenth year.*

As to the power of guardians over the property of their wards, I apprehend that much misconception exists. As I understand the provisions on the subject, "minors are under the protection of the law; favoured in all things which are for their benefit; and not prejudiced by anything to their disadvantage."† It has been laid down by Sir William Jones, that "assets may be followed in the hands of any representative."‡ This is doubtless true, but a latitude has been given to the rule which the terms of it do not warrant. It has been held, I believe, that for this purpose, a guardian may be considered as the representative of the deceased: whereas it is obvious, that *quoad hoc*, he is only the representative of his successor. I understand the expression to mean, that whoever takes the assets, whether near or remote in the order of inheritance, is liable for the debts of the deceased, so far as those assets go, provided such heir have attained the age of majority; and that, where the heir is a minor, the creditor must wait until the minority expires before he can come upon the assets for the liquidation of his debts. Subject to this condition, the son must pay his father's debts, as well as all necessary debts contracted on his account

Power of guardians over the property of their wards.

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with the consent of a near and unimpeachable friend, such as his mother and the rest." See Dig., vol. iv, page 243.

* Section 2, Regulation XXVI, 1793.

† Colebrooke on Obligations and Contracts, Chap. x, §§ 585.

‡ See note to Colebrooke's Translation of *Jagannátha's* Digest, vol. i, p. 266.

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during his minority. And according to the Benares school, the debts of the father are binding on the son,* whether the former left property or not, as well as those of the grandfather ; but he need not pay interest on the latter.

The following case arose but very lately in the court of Sudder Dewanny Adawlut. A, a Hindu *zemindar* of Bengal, executed a deed of sale for a portion of his estate to B; B executing a separate engagement that the sale should be redeemable by repayment of the money with interest within the term of a year. Before the term expired, the *zemindar* A died, leaving a widow and an adopted minor son, or rather a son adopted by authority, after his death, by the widow. Within a few days of the completion of the term when the sale would have become absolute and irrevocable, the widow, as guardian of the minor, borrowed money elsewhere of C, with which she paid the debt of B, and freed the land, executing to the lender a similar second sale of the same land, redeemable within a given term; which term, however, expired without repayment on her part. The question then here was, first, Could any rule of Hindu law prevent the land from becoming the property of B, on the term of the first sale expiring without repayment? Secondly, If there be no such rule, and the widow saved the land for a time by the

* But the obligation is considered only as a moral, and not a legal one, provided there are no assets. See Colebrooke, cited in App., Elem. Hindu Law, p. 347; but the same high authority has laid it down as a principle, in his Treatise on Obligations and Contracts, (chap. ii, §§ 51) that heirs succeed to the obligations of ancestors without any reference to the adequacy of the property, and the rights of inheritance must be relinquished, when its obligations are repudiated. And see Elem. Hindu Law, App., pp. 464 and 465.

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second conditional sale, was it not a case of necessity, such as to justify her act in behalf of her ward, as clearly beneficial to him? Thirdly, If a father sell a portion of his land, with a condition for redemption, and his heir (a minor), or his guardian on his part, do not redeem, is not such land gone irrevocably? And fourthly, Do the debts of a father become payable out of his assets, even in the hands of his heir (who is a minor), on demand from the guardian? The substance of the reply of the Hindu law officers consulted on this occasion was, that no necessity for the sale had been made out, inasmuch as the estate of the deceased could not have been legally alienable for his ancestor's debts until after the minor had attained majority. Judgment was, however, given for the purchaser; and the following arguments were used on the occasion: That supposing the ancestor's conditional sale to have remained unredeemed after the expiration of the period stipulated, and the usual term of notice, the land would, of necessity, have fallen to the former creditor: That it was mere folly to urge, that the act of the mother in saving it for a time, and obtaining a further period, was not to be held good as an act evidently for the benefit of the minor, inasmuch as, but for her renewal by a fresh loan in her capacity of guardian, the conditional sale must undoubtedly have become absolute to the creditor: That according to the invariable practice of the courts, no plea of minority could be listened to, or any other doctrine recognized than that the estate of a Hindu of Bengal becomes liable at his death for the satisfaction of his just debts, especially where he has pledged his land as security for those debts, and that his power of selling outright or conditionally, any part of or all his landed property, could not be questioned: That any other

Question as to the liability of a minor and of his estate during his minority.

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doctrine would involve in confusion the acts of the court for many years past, as there was scarcely a contract of conditional sale in the provinces where that form of contract prevails, in which some out of the numerous co-sharers were not minors when the sale became absolute; and that if their minority, in such cases, must be considered a bar to foreclosure, and cause the transaction to run on fifteen years longer, there would probably be an end to such transactions altogether, and it would not be possible to raise money at all, or at least not except on harder terms than at present: That the doctrine maintained by the court appeared to be supported by the opinion of the commentator *Jagannátha,** and that, though there should prove to be conflicting opinions as to the law, the estalished usage and practice ought to prevail: And, in short, that whatever might be the real doctrine of the Hindu law on the subject, the court was bound to follow that law in matters of inheritance, marriage, caste, and religious usages only, and not in matters of contract, of which nature the case in question appeared to be.

In answer to the above arguments, it may be observed, that supposing the minor's estate not to be liable, there did not exist any necessity for the widow's making a conditional sale. It may be assumed too, that, according to our own regulations, a mortgage would not be foreclosed against a minor, and that he would be allowed his equity of redemption on coming of age. It did not, therefore, signify whether the term of the mortgage was near expiring or not. It was

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* See Digest, vol. i, Chap. 5, On Payment of Debts, and particularly text 172, as translated by Mr. Colebrooke.

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at the lender's own risk to take a mortgage, in which the borrower's interest might expire before the expiration of the term.

I shall not, however, enter into any question as to the expediency or otherwise of the doctrine established in this instance, but content myself with a brief inquiry as to the law of the case, which appears quite clear, when disencumbered of the commentary of *Jagannátha,* whose authority cannot be held to be oracular or incontrovertible in any instance, especially where it is opposed by texts of unquestioned weight and indubitable import. The first text at all to the point is that of *Yájnyawalcya* (191). It has thus been translated by Mr. Colebrooke, with a view to adapt it to the subsequent commentary of *Jagannátha.* "He who has received the estate of a proprietor, leaving no son *capable of business,* must pay the debts *of the estate,* or on failure of him, the person who takes the wife of the deceased; but not the son whose father's assets are held by another." Now here it must be observed, that the words in *Italics* are not in the original, and that the expression "capable of business" is clearly an interpolation of the commentator. The original is *rikthagrahee* or taker of the property. In the concluding part of the text it is distinctly stated, that the son whose father's assets are held by another must not pay the debts. The next text is that of *Náreda* (172), which agreeably to *Jagannátha's* comment, has been thus translated by Mr. Colebrooke: "Of the successor to the estate, the guardian of the widow and the son *not competent to the management of affairs,* he who takes the assets becomes liable for the debts: the son, *though incompetent,* must pay

Authorities on the subject cited.

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the *debt,* if there be no guardian of the widow, nor a successor of the estate; and the person who took the widow, if there be no successor to the estate, nor competent son." Here the original does not mean a son incompetent from minority to manage his affairs, but a son incompetent to inherit by reason of some natural disqualification, such as blindness, disease, or the like. A son, even though incompetent to inherit, in the same manner as a son who does not inherit assets, is morally bound to pay his father's debts; and the object of the above text is to show the obligation under which he lies, if there be no successor to the estate, nor guardian of the widow. There is nothing whatever, in any text that I have been able to discover, relative to the payment of debts by a guardian. Lastly come the two texts of *Cátyáyana* and *Náreda* (187 and 188). "On the death of a father, *his debt* shall in no case be paid by his sons, incapable from nonage of conducting their own affairs; but at their full age of *fifteen years*, they shall pay it in proportion to their shares, otherwise they shall dwell hereafter in a region of horror." "Even though he be independent, a son incapable from nonage of conducting his affairs is not *immediately* liable for debts." It will be observed that *Jagannátha,* in commenting on these passages, attempts to make a distinction between minority and infancy, and infers that it is only during the latter state that a son is exempted from liability for his father's debts; but the text in the original is *apráptavyaváhara,* which clearly means one who has not attained the age prescribed for the management of affairs. It follows, that where, owing to a son's minority, the father's assets are taken in charge by another person, such person cannot legally apply any portion of the assets to

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the payment of the father's debts; and that it is only where a person succeeds to property in his own right, that he is at liberty to pay the debts of the ancestor by means of such property. A guardian may, indeed, dispose of a portion to meet a necessity arising for the minor's subsistence; but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor before he can be liable. Nor does there appear to be much of hardship in this rule. The provisions of the English law savour of much more hardship; for, according to it, real estates are not subject at all to the payment of debts by simple contract, unless made so by will. All immoveable property, in the Hindu law, is subject to a kind of entail; so much so, that the right of the son is equal to that of the father, supposing the property to be ancestral: and it would be hard enough, under such circumstances, that the imprudence of the father should ruin the son; for, as it is, he is bound, both legally and morally, to pay the debts: and it may be, perhaps, but just, that the period for exacting payment should be postponed until he comes to years of discretion sufficient to enable him to realize the means of satisfying the creditors with the least detriment to himself. The assets cannot in the meantime be alienated by the minor, and the creditor is ultimately sure, where assets exist, of receiving the amount of his demand with interest. Especially in a case of mortgage, where the produce of the property or usufruct might be awarded to the creditor in lieu of interest, which arrangement could not operate prejudicially to either party, or involve any breach of the Hindu law, for the usufruct of property is one species of legal interest which is called *bhogalábha*, or interest by enjoyment. The

Conclusion, that the minor heir and his estate are not liable for the debt of his ancestor, until his majority.

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Cases cited in confirmation of the above opinion.

pundits being called upon to expound the law in a case involving a similar question* which was recently decided at Bombay, they declared that a woman who had succeeded as heir at law, to property left by her own father, cannot dispose of that property in liquidation of the debts of her husband, unless her son, having already attained the age of sixteen years, or age of discretion, shall consent to the act. This, it will be observed, is a stronger case than the one above alluded to, because a son is bound to pay the debts of his father, whether he inherits assets, or not; and by this decision it was determined, that property to which he had a claim in expectancy only, could not be alienated for that purpose, until he attain the age of majority; and it was ruled also, in a case decided under the Madras presidency, that the father being dead, his son is not liable for his debts until after he has attained the age of seventeen.†

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* Bombay Reports, vol. i, p. 176.

† Elem. Hindu Law, App., p. 206.

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CHAPTER VIII.

Of Slavery.

Construction of the S. D. A. on the subject of slavery.

Slavery, among the Hindus, cannot properly be enumerated among their religious institutions. In the year 1798, the court of Sudder Dewanny Adawlut, with reference to the long-established and sanctioned usage of slavery in these provinces, stated their opinion, "that the spirit of the rule for observing the Moohummudan and Hindu laws, was applicable to cases of Slavery, though not included in the letter of it." And this construction was confirmed by the Governor General in Council, on the 12th of April 1798; but it was at the same time admitted, that the rule in question is not directly and strictly applicable to questions of personal freedom and bondage.*

It will suffice, therefore, in this place, to give a general outline of the subject, which cannot be done in more comprehensive language than has been already employed by Mr. H. T. Colebrooke.† He observes, "The Hindu law fully recognizes slavery. It specifies in much detail the various modes by which a person becomes the slave of another, and which are reducible to the following heads, viz., capture in war, voluntary submission to slavery for diverse causes, (as a pecu-

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* Harington's Analysis, note 3, p. 70, vol. i.

† Cited in Ibid., vol. iii, 743.

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niary consideration, maintenance during a famine, &c.); involuntary for the discharge of debt, or by way of punishment of specific offences; birth, as offspring of a female slave; gift, sale, or other transfer by a former owner; and sale or gift of offspring by their parents. It treats the slave as the absolute property of his master, familiarly speaking of this species of property in association with cattle under the contemptuous designation of "bipeds and quadrupeds." It makes no provision for the protection of the slave from the cruelty and ill-treatment of an unfeeling master; nor defines the master's power over the person of his slave;* neither prescribing distinct limits to that power, nor declaring it to extend to life or limb. It allows to the slave no right of property, even in his own acquisitions, unless by the indulgence of his master. It affords no opening to his redemption and emancipation, (especially if he be a slave by birth or purchase,) unless by the voluntary manumission of him by his master, or in the special case of his saving his master's life, when he may demand his freedom,† and the portion of

Origin and condition of slavery.

* It will be seen, from the case of Slavery (No. 9), that the *pundits* of the Sudder Dewanny Adawlut, when consulted on the subject, did not hesitate to assign limits to the master's power over the person of his slave; but in the delivery of their opinion they were probably guided by reason, rather than by express law, or perhaps from the analogy of the rule with respect to servants.—*Menu*, Dig. ii, 209.

† But in this instance, *Jaggannátha* makes a distinction. In vol. ii, p. 242, he gives the following illustration: "Where a slave, neglecting his own safety, and highly valuing his master's life, rescues him from the encounter of a tiger or the like, and is himself preserved by the act of God; in that case he is released from slavery. But if some person attempt to destroy a man by poison, and the slave of that man discovering it, prevent him from eating the poisoned food; or if the master intended to go out of his house, not aware of a tiger, standing

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a son; or in that of a female slave bearing issue to her master, when both she and her offspring are entitled to freedom, if he have not legitimate issue; or in the particular instances of persons enslaved for temporary causes, (as debt, amercement, cohabitation with a slave, and maintenance in consideration of servitude,) on the cessation of the grounds of slavery, by the discharge of the debt or mulct, discontinuance of the cohabitation, or relinquishment of the maintenance."

Classed as personal property, with one exception.

Those slaves who correspond to the designation of *adscripti glebæ*, or hereditary serfs, and who, according to the same eminent authority,* are common in the upper provinces, are subject to the laws of ancestral real property, and cannot be transferred except under similar restrictions. Over land acquired by the grandfather, over a corrody, and over slaves employed in the husbandry, says *Yájnyawalcya*, the father and the son have equal dominion.† All other descriptions of slaves would appear to class with personal property.

Question as to the abolition of slavery.

The question of ameliorating the condition of slaves in India has not escaped the consideration of Government; but the difficulty of legislating on so delicate a subject must be obvious. Every one who has had the good fortune to be born in a state of freedom must be sensible of its invaluable blessings, and numerous arguments will occur to every mind in favour of the abolition of slavery.

That the evils of slavery are manifold, is unquestionable. That its total and immediate suppression might be followed

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at the door, but his slave, seeing the tiger, prevent him; in these and similar cases, it may be admitted he is not released from servitude."

* Ibid., 745.

† Cited in Dig., vol. ii, 159.

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by mischievous consequences, can admit but of as little question; while in India it must be confessed, whatever objections may be theoretically advanced to its existence, the condition of the slave himself differs in not much more than in name from that of a hired servant. Speaking of Moohummudan slavery in another place,* I observed: "In India, (generally speaking,) between a slave and a free servant there is no distinction but in the name, and in the superior indulgences enjoyed by the former: he is exempt from the common cares of providing for himself and family: his master has an obvious interest in treating him with lenity; and the easy performance of the ordinary household duties is all that is exacted in return." I have no reason to believe that the system of slavery, as it exists among the Hindus, is productive of much individual misery, however baneful its effects may be to society at large. The courts of justice are accessible to slaves as well as to freemen, and a British magistrate would never permit the plea of proprietary right to be urged in defence of oppression. If, then, but few grievances are complained of, it is fair to infer that few exist.

And as to substituting the Moohummudan for the Hindoo law in this respect.

It was one of the suggestions of the philanthropic individual† who advocated the cause of the abolition of slavery in India, that, in the event of its being deemed inexpedient to suppress the system altogether, the Moohummudan law, as being more lenient in its provisions, should be universally adopted, to the exclusion of that of the Hindus. But to the latter class, it is evident that the standard of the former

* Prelim. Rem. Prin. and Prec. Mooh. Law.

† Mr J. Richardson, formerly judge and magistrate of Bundlekund, who in the year 1810, submitted the draft of a regulation on the subject.

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would not admit of adaptation; for according to the Moosulman tenets, they only are, legally speaking, slaves, who are captured in an infidel territory in time of war, or who are the descendants of such captives. Capture in war is indeed a cause of slavery according to the Hindu law, as well as according to the Moohummudan; and perhaps among all other nations, the same cause was originally productive of the same effect. The triumph of the strong over the weak destroys the natural equality of the human condition; and to a savage mind, the persons of the conquered obviously suggest themselves as the legitimate reward of victory. To this source in all countries, may be traced the privation of freedom. But with the gradual increase of civilization, when superiority of physical force alone became less respected, other causes operated to the establishment of servitude of a more or less qualified nature: and thus, with the Hindus, besides the right accruing from conquest, and transfer implying a previously existing right, (which comprehend the *Grihajata*, or one born of a female slave in the house of her master; the *Crita*, or one bought; the *Lubdha*, or one received by donation; and the *Crumagata*, or one inherited from ancestors,) there is that species of slave termed *Atmabikrya*, or one self-sold, signifying him who for a pecuniary consideration barters his own freedom. All the slaves above enumerated, and their offspring, must be considered to be in a state of permanent and hereditary thraldom. Of permanent slavery,

There exists, besides, the state of bondage in various temporary forms, many of them differing slightly, if at all, from voluntary servitude. One who offers himself willingly as a slave, he who was won in a stake, and even a captive in war, may effect their own emancipation by offering a proper sub- and temporary.

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stitute.* One who enters into a state of slavery for the sake of maintenance, and he who becomes a slave for the sake of his bride, may both be restored to freedom, on relinquishing the object which induced them to part with it.† A pair of oxen is the price of emancipation to one maintained in a famine; while one relieved from a great debt, and he who has been pledged for a certain sum, or hired for a specific period of slavery, are emancipated, the two former on payment of the consideration, and the latter on the expiration of the term.‡ An apostate from religious mendicity, is he who forsakes his duty, and deviates from the rules of the order which he has imposed on himself, as if he were to take a wife, or otherwise act like a householder,§ in which case he should be condemned to a state of slavery; but it is inferrible, that the offence may be expiated by the payment of a fine.||

Emancipation how obtainable.

From the above it will be perceived, that there are five descriptions of permanent thraldom, from which emancipation can be effected only at the will and pleasure of the master, and that four of those five are consequent on a pre-existing state of slavery. For the rest, on performance of certain conditions peculiar to each, the slave is entitled to freedom.

It must be owned, that the recognition of legal slavery in any form must tend to perpetuate its existence: but at the

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* *Náreda*, cited in Dig., vol. ii, 246.

† *Náreda*, Ibid., vol. ii, 247.

‡ *Náreda*, Ibid., 243, 347.

§ Dig., 227.

|| Ibid., 229.

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same time, long-established usages should be respected, especially where society has not attained such a state of civilization, as to admit of a clear perception of the general benefits intended to result from an invasion of individual rights: and so long as the legislature, in its wisdom, and from a respect for ancient institutions, shall not deem it advisable to interfere with a view to the suppression of the system, it can only be hoped that the gradual diffusion of knowledge, and the consequent spread of enlightened notions, will tend to convince all ranks of the community, that rational liberty is the condition most conducive to the happiness and interests of mankind.*

* There are nine cases illustrative of the doctrine of slavery given in the second volume of this work. The question appears also to have been a good deal discussed in the courts subordinate to the presidencies of Madras and Bombay. See Elem. Hin. Law, App., p. 230, *et. seq.*

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CHAPTER IX.

Of Contracts.

The principles of the Hindu law relative to contracts, are founded on the basis of good sense and equity. The same incapacitating circumstances which are the means of avoiding contracts, according to other systems, have been specified by the Hindu jurists. Thus insanity, minority, coverture, lesion, error, force, fraud, incompetency, incapacity, and revocation,* are each the cause of effecting the dissolution of obligations. To these must be added degradation, entry into a religious order,† and any predicament that operates as a civil death. **Causes of dissolving obligations.**

The term insanity comprehends not only madmen and idiots, but also all those who labour under any species of fatuity, and who are naturally destitute of power to discriminate what may, and may not be done.‡ **Insanity.**

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* *Vrihaspati*, cited in Dig., vol. ii, p. 328. *Menu*, Ibid., vol. i, 458.

† *Vasishtha*, Ibid., vol. iii, 327.

‡ Dig., vol. ii, 187. There is a case detailed in the Bombay Reports, (vol. ii, p. 114,) in which the sale of a house by an aged, infirm, and foolish man was set aside at the suit of his wife, upon a *vyavastha* of

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Minority. Minority continues until after a man has entered his sixteenth year, when he becomes acquainted with affairs, or *adult in law*:* but in the Hindu law, minority is used as a term of an indefinite import, and comprehends those who are incapacitated from conducting their own affairs by extreme old age, as well as those who are incapable, owing to their extreme youth.†

Coverture. The Hindu law recognizes the absolute dominion of a married woman over her separate and particular property, except land given to her by her husband. He has, nevertheless, power to use and consume it in case of distress; and she is subject to his controul, even in regard to her separate and peculiar property.‡ It is a general rule, that coverture incapacitates a woman from all contracts; but those contracts are valid and binding which are made by wives, the livelihood of whose husbands chiefly depends on their labour;§ so also are those made for the support of the family, during the absence or disability, mental or corporeal, of the husband.||

Lesion. A contract, says *Menu*, " made by a person intoxicated, or insane, or grievously disordered, or wholly dependant, by an infant, or a decrepid old man, or *in the name of*

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the Hindu law officers, the price paid being proved to be inadequate, though it was not by any means established that the vender was an idiot.

* *Smriti*, cited in Dig., vol. ii, 115.

† Dig., vol. ii, 187.

‡ Colebrooke, Obl. and Con., Book 4, vi, §§ 611.

§ Dig., vol. i, 318; and see case 2, Chap. of Debts, vol. ii.

|| Dig., vol. i, 296.

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another by a person without authority, is null." In these cases, lesion may be presumed on the ground of incompetency. But among persons who are competent, the maxim of "*caveat emptor*" applies. Thus, *Náreda* ordains: "A buyer ought at first himself to inspect the commodity, and ascertain what is good and bad in it; and what after such inspection he has agreed to buy, he shall not return to the seller, '*unless it had a concealed blemish.*'"* There is indeed a provision similar to that which obtains in the Moohummudan law, giving an option of inspection; and with respect to articles not of a perishable nature, the contract may be rescinded within ten days.† For other articles of a perishable nature, there are different periods allowed, subject to the payment of a small fine by the rescinding party.‡

A gift may be revoked, if made under a mistake; and by analogy to this rule, every contract is vitiated by error.§ Error.

Any species of duress vitiates a contract. Thus *Jagannátha*, commenting on the text of *Náreda*, to the effect that what a man does while disturbed from his natural state of mind is void, observes: "In cases of fear and compulsion, the man is not guided solely by his own will, but solely by the will of another. If, terrified by another, he give his whole estate to any person for relieving him from apprehension, his mind is not in its natural state; but after recovering tranquillity, if he give anything in the form of a Force.

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* Cited in Dig., vol. ii, 313.

† *Menu.*

‡ Dig., vol. ii, 321.

§ Colebrooke, Obl. and Con., Book 2, vii, §§ 102.

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recompense, the donation is valid.* This corresponds with what has been stated by Mr. Colebrooke in his Treatise on Obligations and Contracts, that though by the Hindu law all things done by force are pronounced null, yet in fact they are, in every system of jurisprudence, *voidable* rather than *void;* as they are susceptible of confirmation by assent subsequent, whether express or tacit.†

Fraud. Under the head of fraud, it may be observed, that any fraudulent practice, (to which the word in the original, *chhala,* is synonymous,) vitiates a contract;‡ and in a contract of sale, if the vender, having shewn a specimen of property free from blemish, deliver blemished property, the vendee may return it at any time, and the vender is liable to pay a fine and damages, on account of his dishonesty.§

Incompetency. Of incompetency to contract, where the possession and even the proprietary right exists, there are frequent instances. The most familiar is that of a coparcener, who is prohibited from giving, mortgaging, or selling his own share of the immoveable estate, except at a time of distress, for the support of his household.|| According to the law, however, as current in Bengal, the contract, though not valid so far as regards the shares of the other parceners, is valid so far as regards the seller's own share.¶ And not only

* Dig., vol. ii, 183.

† Ch. vii, §§ 109.

‡ Ibid.

§ *Cátyáyana* and *Náreda*, cited in Dig., vol. ii, 323, 325.

|| *Vyása*, cited in Dig., vol. iii, 433.

¶ Ibid., 434.

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are the survivors answerable for a debt contracted by their deceased partner, if the sum borrowed was applied to their use ; but, according to *Menu*, "should even a slave make a contract in the name of his absent master for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it." A similar prohibition extends to the case of widows on whom the property of their husbands has devolved, and who are declared incompetent to alienate, except for special purposes; and in a case recently adjudicated, where the heirs of a person deceased refused payment of a bond contracted by his widow (also dead), and in which it was proved that part of the amount was expended in payment of her husband's debts, it was held, that the heirs were liable for so much of the amount as had been so laid out, but that the widow could not saddle the estate or the heirs with any unnecessary burthen ;* and it has been laid down as a general principle by Mr. Colebrooke, that the head of a family is answerable for necessaries supplied for the indispensable use of it, and for the subsistence of the persons whom he is bound to maintain, whether it be his wife, his parent, his child, his slave, his servant, his pupil, or his apprentice to whom the necessaries are furnished, and goods indispensably requisite are delivered.†

In recapitulating the causes of incapacity, *Yájnyawalcya* observes: "A contract made by a person intoxicated, or insane, or grievously disordered or disabled, by an infant, or a man agitated by fear or the like, or in the name of Incapacity.

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* Ibid., p. 201.

† Obl. and Con., Book 2, §§ 49.

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another by a person without authority, is utterly null." Upon the above passage *Jagannátha* thus comments: "Singly the gift of wages of a man possessing his senses is valid; joined with madness or the like, the intentional payment of wages during a lucid interval may also be valid; but singly a gift by a man affected by insanity or the like is void." From this comment the principle may be deduced, that the act of a lunatic may be effectual, if the contract be onerous and the agreement rational, on the presumption of the act having been done during a lucid interval; but that where it may be prejudicial to him, and unattended with any benefit, it should be held to be *ipso facto* void: so also the validity of a deed executed by a man in his last illness should be upheld, if it be proved that he was of sound mind at the time of its execution; but otherwise, if it appear that his mind was not in its natural state.

This point was ruled by the Sudder Dewanny Adawlut, in a suit by a Hindu widow against the brothers of her husband, who died childless; to which the defendants pleaded a conveyance from the brother to them, executed during mortal sickness, four days before he died; and it was held, that in law, the only question was, whether in point of fact he was of sound mind at the time.*

Revocation. Eight gifts, according to *Cátyáyana*, are not subject to revocation or retraction: What has been given as wages, as the price of an entertainment, as the price of goods sold, as a nuptial gift to a bride or her family, as an acknowledgment

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* Case of Radhamunee Debia *v.* Shamchunder and Rooderchunder, S. D. A. Reports, vol. i, p. 85.

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to a benefactor, as a present to a worthy man, from natural affection, or from friendship.* *Harita* declares: "A promise *legally* made in words, but not performed in deed, is a debt of conscience, both in this world and the next; but where a promise has been made, or a thing given, to a person whom the law declares incapable of receiving, or where it has been given for a consideration unperformed, the law permits the nonperformance of the promise in the one case, and the revocation in the other.† It is a general rule, that in the case of a pledge, a gift, or a sale, the prior contract has the greatest force, and that in all other contested matters the latest act shall prevail.‡

The liquidation of debts is rigorously enjoined: for instance, it is provided that sons must pay the debt of their father, when proved, as if it were their own, that is, with interest, and whether they have inherited assets or not.—The son's son must pay the debt of his grandfather, but without interest; and his son, that is, the great-grandson, shall not be compelled to discharge the debt, unless he be heir and have assets.§ The reason of this last-mentioned distinction is not very obvious, nor does it appear why the equitable principle of rendering assets requisite to responsibility should be limited to the great-grandson alone. But in all cases, the liability extends only to just and reasonable

What contracts are binding on representatives.

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* Dig., vol. ii, 174.

† Dig., ii, 171.

‡ *Yájnyawalcya*, cited in Dig., i, 477.

§ Dig., vol. i, p. 266. According to Sir William Jones, where there are no assets, the son and grandson are under a moral and religious, but not a civil, obligation to pay the debts. See note to Ibid.

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debts. Hindu gifts are not binding on representatives: and in a case where a person contracted to pay to another a sum of money in consideration of that person's giving his daughter in marriage to the son of the contracting party, it was held that the contract was not binding after his death; the law not permitting money to be given for a bride, and the consideration consequently not being a legal one:* and it should be observed, that in all such cases the turpitude is considered to be on the side of the receiver, the giver not being deemed to have seriously intended to give.†

I deem it wholly superfluous to enter into further disquisition relative to the law of contracts, bailment, or other matters connected with judicial proceedings. They who are desirous of further information on this head, and other miscellaneous matters, should consult the "Elements of Hindu Law," which contains an epitome of the law of Contracts, and "Considerations on the Hindu Law, as current in Bengal," in which will be found a compilation of the principal rules connected with the subject. Were any outline of the subjects alluded to attempted in this place, the result would probably be a repetition, in substance, of what has been laid down by the above-mentioned authorities. The rules connected with the law of evidence are few and simple. The testimony of any person interested in the case is not admissible. Various descriptions of incompetent witnesses are enumerated, and much is left to the discretion of the judge with respect to the credit which should be attached to testimony. In the last resort, discovery may be

* Bom. Rep., vol. ii, p. 194.

† Obl. and Con., Book 2, §§ 124.

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had by compelling a defendant to make oath, or by ordeal.—On the subject of evidence, it will be perceived that one or two cases have been propounded to the Hindu law officers in the *mofussil* courts : but with reference to this and other topics connected with judicial proceedings generally, I beg to refer to the following Chapters.

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A TRANSLATION

OF

A PORTION

OF

THE MITACSHARA.

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CHAPTER I.

Mitacshara.

ON THE ADMINISTRATION OF JUSTICE.

SECTION I.

Constitution of a Judicial Assembly.

Judicial duty of a king.

1. The protection of his subjects is the chief duty of a consecrated and otherwise qualified king, and this cannot be performed without restraining evil doers. But they cannot be discovered without legal investigation. Wherefore it is requisite, that daily attention should be paid to judicial proceedings, which gave rise to the text: "The king in person, being aided by assessors, should daily investigate judicial proceedings."* But no explanation has yet been given of the nature, number, and forms of judicial proceedings. This second lecture is now commenced with a view of elucidating these points.

What law to be followed.

2. "The king, divested of anger and avarice, and associated with learned Brahmins, should investigate judicial proceedings conformably to the sacred code of laws."†

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* This refers to a former passage of *Yájnyawalcya* cited in the Chapter treating of *Achar*.

† *Yájnyawalcya*, cited in the *Vyavahárámádhava*, *Smritichandricá*, *Vyavaháramayúc'ha*, *Smritichintámani*, *Veeramitrodaya*, and *Vivádatandava*.

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General definition of a judicial proceeding.

3.* *Judicial proceedings.*] The assumption of a fact in favour of one's self, to the exclusion of the interests of another. Thus, for example, one person asserts, "This field *or the like,* is my property," and another in opposition asserts, "It is mine."

Use of the plural number.

4. The plural number is used to show the multiplicity of judicial proceedings.

The duty is incumbent on all governors.

5. *The king.*] The use of this word demonstrates that the duty here enjoined is not confined to the military tribe, but extends to all those on whom the care of Government devolves.

Further explanation of the text.

6. *Investigate.*] The repetition of this word is used for the sake of enjoining the particular duty.—[*With learned.*] With those acquainted with the code of laws, the *Vedas,* the science of grammar, &c.*—[*Brahmins.*] Not persons of the military or other tribes.

Responsibility of the king.

Hence it follows, that the king, and not the Brahmins, is responsible for the neglect or perversion of justice; as *Menu* has said: "A king who inflicts punishment on such as deserve it not, and inflicts no punishment on such as deserve it, brings infamy on himself, while he lives, and shall sink, when he dies, to a region of torment."†

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* The use of the third or causative case here denotes their inferiority: it being a rule of grammar, that the preposition should be connected with a secondary agent.

† *Menu,* 8. 128, cited in the *Dundavivaca, Viramitrodaya, Vyavaháramádhava,* &c.

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7. *Conformably to the sacred code of laws.*] Not according to ethical law. Local, temporal, and other ordinances which are not in opposition to the sacred code, are not separately treated of, as they do not form a different subject. Moreover, the following text may be here recited: "A man should pay implicit obedience to any temporal regulation or legal enactment which may not militate against his peculiar duty."* Explanation of what law to be followed.

8. *Divested of anger and avarice.*] Conformity to the sacred code having been already enjoined, this injunction seems to be superfluous; but it is used to show the paramount necessity of such conduct. "*Anger*," impatience of temper; "*avarice*," excessive desire of gain. Of the terms anger and avarice.

9. Moreover, "Persons who are versed in literature, acquainted with the law, addicted to truth, and impartial towards friend and foe, should be appointed assessors of the court by the king."† Appointment of assessors.

10. *Persons who are versed in literature*:] that is, who are eminent in the study of philosophy, grammar, &c., and in comprehending the *Vedas*. "*Acquainted with the law*:" familiar with the sacred code of laws. "*Addicted to truth*:" prone to habitual veracity. "*Impartial towards friend and foe*:" divested of enmity, affection, partiality, prejudice, and the like. Let persons with the qualities here described Explanation of the text.

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* *Yájnyawalcya*, cited in the *Dipacalica*, *Viramitrodaya*, *Smritichintámani*, and *Vyavahárámádhava*.

† *Yájnyawalcya*, cited in the Commentary of *Viramitrodaya*, *Dipacalica*, *Vyavahárámádhava*, *Vivádárnavasetu*, *Vivádabhangárnava*, *Vivádatandava*, *Vyavahárámayúc'ha*, and *Smitrichandricá*.

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be seated in the assembly, as assessors *(Subhasuda)* induced by regal generosity, honours, and respect.

Should belong to the Brahminical tribe.

11. Although the epithet "versed in literature" has here been used without restriction, yet it is intended to be confined to the Brahminical tribe, as *Catyáyana* has stated: "He (the king) should be associated with assessors, wise, experienced, eminent, of the highest tribe, familiar with the meaning of the sacred and moral codes."*

Number of the assessors.

12. These assessors are to be three in number, as the use of the plural requires; and this appears also to be the requisite number from the text of *Menu:* "In whatever country three Brahmins, particularly skilled in the several *Vedas*, preside, &c."† But *Vrihaspati* has declared, that the number may be either three, five, or seven: "That assembly in which seven, five, or even three Brahmins versed in religious and worldly duties, preside, is equal to sacrificial ground."‡

Assessors are distinct from the first mentioned Brahmins.

13. The epithet "versed in literature" must not be construed to apply to the Brahmins mentioned in the first text, because the epithet here used is in the first or nominative case, and cannot consequently consist with the term Brah-

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* *Viramitrodaya, Smritichandricá, Calpataru.*

† The remainder of the text is, "together with the learned Brahmin appointed by the king, the wise call that assembly a court of Judicature." *Menu*, 8, 11. *Smritichandricá, Medhathithee, Viramitrodaya.*

‡ *Vrihaspati*, cited in the *Smritichintámani, Vivadatandava, Vyavahάramayūc'ha, Vyavahάramάdhava, Viramitrodaya, Madhaviya, Calpataru, &c.*

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mins mentioned in the former text, which appears in the third or causative case; besides which, there would be a repeated mention of the requisite quality of learning. *Cátyáyana* has propounded an evident distinction between the Brahmins and assessors. 'A king who investigates together with his chief judge, ministers, domestic priest, and assessors of the court, according to law, shall attain paradise."*

14. The difference here is, that the Brahmins are not appointed, and the assessors are. Hence it has been ordained: "A person, whether appointed or not, is entitled to furnish legal advice."† It behoves those who are appointed officers to oppose a king proceeding illegally, after they have tendered true counsel: by acting otherwise they are culpable, as declared by *Cátyáyana*: "Those assessors who follow a king pursuing the path of injustice, become participators in his act."‡ Hence it follows, that he should be remonstrated with by them. **Duty of assessors.**

15. They, on the other hand, who are not appointed formally, become culpable by offering illegal advice, or withholding their counsel, but not by omitting opposition. This is conformable to the ordinance of *Menu*. "Either the court must not be entered by judges, parties, and witnesses, **Duty of other counsellers.**

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* *Veeramitrodaya*, *Vyavahúramayúc'ha*, *Smritichandricá*, *Smritichintámani*, *Vyavahúramadhava.*

† Cited in the *Veeramitrodaya*, as the text of *Vasishtha*, but as the text of *Náreda* in the *Vyavahúramayúc'ha*, and *Smritichintámani*.

‡ *Smritichintámani*, *Vivádatandava*, *Vyavahúramadhava.*

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or law and truth must be openly declared: that man is criminal, who either says nothing, or says what is false and unjust."*

A few men of the commercial class should be called in.

16. From the conjunction "*and,*" used in the text, (§§ 10,) it appears, that for the sake of adding popular confidence to the assembly, some persons of the commercial class should also be called in to assist, as *Cátyáyana* says: "A few merchants should be summoned, men of good family and disposition, of a respectable age and good conduct, wealthy, and devoid of envy."†

King may appoint a representative.

17. It has been stated, that the king should investigate judicial proceedings, but an alternative is propounded: "A Brahmin acquainted with all duties should be appointed, and associated with the assessors, by a king who is unable through want of leisure to investigate judicial proceedings."‡

Text explained.

18. *A Brahmin:* [Not a man of the military or other tribes.—*Acquainted with all duties*:] One who knows and revolves in his mind all duties, whether of temporal origin or enjoined by law, is to be appointed, and associated with the assessors, by a king whose mind is engrossed with other affairs, for the purpose of investigating judicial proceedings.

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* *Menu*, 8, 13, cited in the *Smritichintámani*, but as the text of *Cátyáyana* in the *Vivádatandava*, *Dandaviveca*, and as the text of *Menu* and *Náreda* in the *Smritisára*, *Medhatithi*, *Cullucabhatta*.

† Cited in the *Smritichandricá*, *Calpataru*, *Mádhaviya*, *Veeramitrodaya*, *Vivádatandava*.

‡ *Yájnyawalcya*, cited in the *Vyavahármayúc'ha*, *Veeramitrodaya*, *Dipacalica*, *Smritichintámani*, *Vivádatandava*, and by *Aparaditya*.

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19. He should appoint a Brahmin endued with such qualities as *Cátyáyana* has described in the following text: "Subdued, of a respectable family, impartial, temperate, firm, mindful of futurity, virtuous, attentive, uninfluenced by passion."* — Qualifications of the representative.

20. If such a Brahmin cannot be found, the king may appoint a *Cshetrya* or a *Vaisya*, but not a *Sudra*, as *Cátyáyana* has said: "Where there is not a [qualified] Brahmin, he may appoint a man of the military or mercantile tribe who is conversant with jurisprudence, but a *Sudra* must carefully be avoided."† — Tribe of the representative.

21. *Náreda* has mentioned this representative as a principal: "Taking the sacred code of laws as his (guide), and deferring to the opinion of the chief judge, let the king deliberately and regularly investigate judicial proceedings."‡ — Supremacy of the chief judge.

22. *Deferring to the opinion of the chief judge:*] Not relying exclusively on his own; in like manner as a king by means of his spy beholds the army of his enemy. — Explanation of the text.

23. The term *Pradvivak*, or chief judge, is etymologically appropriate. He interrogates *(prichutee)* the plaintiff and defendant: hence is derived by grammatical rules the active participle *prad*, the interrogator. With the assessors — Etymological derivation of the term.

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* Cited in the *Smritichandricá*, *Calpataru*, *Veeramitrodaya*, and *Smritichintámani*.

† Cited in the *Smritichandricá*, *Calpataru*, *Mádhaviya*, *Dipacalica*.

‡ *Náreda*, cited in the *Veeramitrodaya* and *Vivádatandava*.

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he weighs or investigates (*vivechyutee)* the truth or falsehood of their assertions: hence is derived *vivak*, the investigator: hence, by the compound, he is termed *Pradvivak.* It is said, "He who, with *(in the presence of)* the assessors, carefully inquires into the subject-matter, and investigates the point at issue, is termed the *Pradvivak,* or chief judge."*

Punishment of unrighteous judges.

24. So also: "Those judges who act unconformably to the laws, or otherwise improperly, are to be severally amerced in twice the amount of the suit, whether under the influence of partiality, avarice, or fear."†

Explanation of the text.

25. *Those judges who act unconformably to the laws:*] In opposition to the sacred code.—"*Or otherwise improperly:*" Inconsistently with approved usage.—"*Under the influence of partiality:*" Swayed by undue bias.—*Avarice,* excessive desire of gain.—*Fear,* terror: or otherwise subdued by the prevalence of their passions;—"*are to be severally,*" one by one,—"*amerced in twice the amount of the suit,*" in double the penalty incurred by the losing party, not in twice the value of the thing in dispute; for were such the law, in actions relative to adultery and the like, there could be no fine.

Penalty incurred only where the wrong is wilful.

26. The specific mention of partiality, avarice, or fear, implies, that the penalty of twice the amount does not extend to cases of error, inadvertence, or the like. Such is the import of the injunction.

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* *Vyása*, cited in the *Vivádatandava*, and by *Calpataru*.

† *Yájnyawalcya*, cited in the *Dipacalica*, and by *Mitramisra*, *Aparaditya*, *&c.*

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27. " The king is superior to all, except Brahmins."* From this text of *Goutama* it must not be inferred that Brahmins are exempt from amercement, for the text is intended merely for the purpose of generally extolling the Brahminical tribe. It is ordained in the *Sutra:* " Six things are to be avoided by the king [acting with respect to the Brahmins :] The punishment of flagellation, of imprisonment, of amercement, of banishment, of reprimand, and of expulsion."† But the excepted person must be eminently learned, skilled in worldly affairs, in the *Vedas* and *Vedangas:* intuitively wise, well stored with tradition and historical wisdom, continually revolving these subjects in his mind, conforming to them in practice, instructed in the forty-eight ceremonies, devoted to the observance of his three-fold and six-fold duties, and versed in local usages and established rules.‡ The mere order of priesthood is not sufficient to exempt. **Brahmins may be amerced.**

Section 2.

On the Subject of a Judicial Proceeding.

1. The subject of a judicial proceeding is now propounded. " When a person aggrieved by another in a manner contrary to law or approved usage, represents it to the king, or the chief judge, that representation is termed the subject of a judicial proceeding."§ **Subject of a judicial proceeding defined.**

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* Cited in the *Veeramitrodaya*, *Dandaviveca*, and *Vivádatandava*, as the text of *Goutama* and *Vasishtha.*

† Cited in the *Dandaviveca* and *Vivádatandava* as the text of *Goutama* and *Vasishtha.*

‡ Cited in the *Veeramitrodaya*, and *Vivádatandava.*

§ *Yájnyawalcya*, cited in the *Dipacalica*, *Veeramitrodaya*, *Subodhini*, *Smritichintámani*, *Vivádatandava*, *Vyavaharámayúc'ha*, *Mádhaviya*, and *Smritisára.*

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Explanation of the text.

2.* When a person aggrieved or distressed by another, in a manner or through means inconsistent with, or contrary to approved usages or law, represents or sets forth his grievance to the king, or chief judge, that grievance so represented is termed the subject of a judicial proceeding, the component parts of which are the declaration or charge, and the answer, and, which forms the groundwork of deliberation, evidence, and decision and judgment. This is its general definition.

Charges are two-fold. Presumptive and positive.

A charge or declaration is two-fold, presumptive and positive, as *Náreda* has declared : "Allegations are comprized under two heads, presumptive and positive, depending on presumption or certainty. Presumption may arise from a person's keeping bad society, and certainty from some visible proof, as seeing the stolen property," &c.*

Positive charge are two-fold, for commission or omission.

4. A charge or declaration founded on certainty, is of two descriptions, of omission and of commission. The former is exemplified by this allegation, "He has received my gold, (or other article,) and will not restore it;" and the latter, "He has forcibly seized my land." *Cátyáyana* has propounded the distinction, "He is unwilling to do justice, or he does an act of injustice."†

Subjects of judicial proceedings are eighteen-fold.

5. Subjects of judicial proceeding are propounded as being of eighteen sorts, according to *Menu.* "Of those titles, the first is debt, or loans for consumption; the second,

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* Cited in the *Vivádatandava* and *Smritichintámani.*

† Cited in the *Vivádatandava* and *Veeramitrodaya.*

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deposits, and loans for use; the third, sale without ownership; the fourth, concerns among partners; the fifth, subtraction of what has been given; the sixth, non-payment of wages or hire; the seventh, non-performance of agreements; the eighth, rescission of sale and purchase; the ninth, disputes between master and servant; the tenth, contests on boundaries; the eleventh and twelfth, assault and slander; the thirteenth, larceny; the fourteenth, robbery and other violence; the fifteenth, adultery; the sixteenth, altercation between man and wife, and their several duties; the seventeenth, the law of inheritance; the eighteenth, gaming with dice, and with living creatures: these eighteen titles of law are settled as the groundwork of all judicial procedure in this world."*

Diversity of claims.

6. These also are greatly multiplied by the diversity of claims, as *Náreda* has declared: "Of these also the distinctions are a hundred and eight-fold. From the diversity of men's claims, there are a hundred ramifications."†

Complaint should be made voluntarily.

7. From the words, "when a person aggrieved represents to the king," it follows that he himself should come forward and voluntarily make the representation, and not at the instigation of the king or his officer, or their deputies, as *Menu* has declared: "Neither the king nor his officers must ever promote litigation, nor on any account neglect a lawsuit instituted by others."‡

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* *Menu* 8, § 5, 6 and 7. Cited in the *Smritichintámani*, *Vyaváhara-mayúc'ha*, *Dipacalica*, *Medhatithi*, *Vivádabhangarnava*, and by *Mitramisra*, *Cullucabhatta*, and *Govind Raj*, but in the *Vivádatandava* as the text of *Menu* and *Marichi*.

† Cited in the *Vivádatandava* and *Veeramitrodaya*.

‡ *Menu* 8, 43. Cited in the *Veeramitrodaya*, *Medhatithi*, *by Cullucabhatta*, *Govind Raj*, *Mitramisra*, and in the *Mádhaviya* and *Smritichintámani*.

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There may be many complainants against one.

8.* *By others.*] This term includes the singular, dual, and plural number. Hence it is evident that an allegation may be made by one, two, or more persons against the same individual. But the following text of *Náreda,* "An allegation of one person against many, of females or a servant, must be rejected, as is declared by those who are conversant with law,"* applies to a case where issues are distinct.

Section 3.

Process of Citation.

Summons to be served on him against whom the allegation is made.

From the words "represents it to the king," (Section 2, §§ 1,) it appears that the complainant, after being interrogated, should humbly state his case. Should the representation appear just, his adversary, unless exempted by infirmity, should be summoned by means of an order under seal, or so forth. This is an obvious consequence, and has not therefore been noticed by the author, although expressly enjoined in other treatises.

Complainant to be interrogated previous to summons being issued.

2. "A king should thus interrogate a person coming before him, at a proper time, in a respectful attitude, saying: "Fear not, O man, but disclose by whom, where, when, and from what cause, your grievance arises."† He should then in conjunction with Brahmins and his assessors, deliberate on the representation thus made; and should it appear reasonable, he shall deliver to him (the complainant) a summons,

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* Cited in the *Veeramitrodaya, Vyavaharámayúc'ha, Mádhaviya, Smritisára, Smritichandricá, Dipacalica, Vivádachandra.*

† *Cátyáyana,* cited in the *Smritichandricá, Calpataru, Vyávahára mayúc'ha,* and *Mádhaviya.*

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or depute an officer for the purpose of citing the adverse party."*

3. "A sick person, a minor, an old man, one surrounded with difficulties, or occupied with religious ceremonies, or those whose absence would be detrimental to their interests, or who are in distress, (*i. e.*, who are afflicted for the loss of their or his beloved object,) or engaged in the affairs of government, or in the celebration of a festival, should not be summoned. The king should not summon one intoxicated, deranged, or idiotic, or persons in grief, or servants, or those who are dependant."† Who should not be summoned.

4. "Nor a young woman who is without her husband, nor any woman born of a noble family, nor one lately delivered, nor a damsel of the highest tribe. These are termed dependant on their relations."‡ Further exceptions.

5. "But women whose families are dependant on them, profligates and harlots, those who are expelled from their family, or degraded, may be summoned."§ Who may be summoned.

6. "Having ascertained the time, place, and comparative importance of the charge, the king may summon even those who are sick, [causing them to be conveyed] slowly in Those exempted may be summoned in certain instances.

* *Cátyáyana*, cited in the *Vyavahàramayúc'ha.*

† *Cátyáyana*, cited in the *Vyavahàramayúc'ha*, and in the *Smritichandricá* as the text of *Harita.*

‡ *Cátyáyana*, cited in the *Vyavahàramayúc'ha*, *Smritichandricá*, *&c.*

§ Ibid.

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a carriage."* "Having inquired into the complaint, the king may mildly summon those who have absconded into forests."†

Of arrest.

7. The legality of arrest is also inferrible from the context. It has been described by *Náreda*: "A person being about to prefer a claim, may arrest his adversary evading it, or not giving satisfaction in the matter, until the arrival of the summons."‡

Arrest four-fold.

8. "Arrest is four-fold: local, temporary, inhibition from travelling, or from pursuing a particular occupation; and the person under such arrests must not break them."§

Of breaking arrest.

9. "One who being arrested at a proper time breaks his arrest, is to be fined, and one arresting improperly is liable to penalty."||

Improper arrest.

Exemptions for arrest.

10. "No culpability attaches to him who breaks an arrest put upon him while crossing a river, or place difficult of access, or while in an inhospitable country, or otherwise in perilous circumstances." "One desirous of celebrating his nuptials, afflicted with disease, about to perform a sacrifice, surrounded by difficulties, sued by another party, transacting the affairs of government, cowherds while in the act of

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* *Cátyáyana*, cited in the *Vyavahâramayúc'ha*.

† *Harita*, cited in the *Smritichandricá*.

‡ *Náreda*, but *Menu* in the *Smritichandricá*.

§ *Náreda*.

|| *Náreda*.

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tending their cattle, husbandmen in the act of cultivation, artizans engaged in their trades, soldiers engaged in warfare, are not to be arrested by the party, nor summoned by the king."*

11. Arrest signifies detention by order of authority. Meaning of the term.

12. Those who are sick and the rest [the other exempted persons] may depute a son and so forth, a relation or other friend. Such persons cannot be charged with officiousness, as described in the following text of *Náreda:* "He is guilty of officiousness, who is neither the brother, the father, the son, nor the constituted agent [of the party]; should he interfere, he is liable to amercement."† Sick and other exempted persons may appear by deputy.

Section 4.

Of the Declaration.‡

1. When the adversary shall be brought in by means of a summons, order, or king's officer, it is next propounded what is to be done. "The declaration of the complainant, as represented by him, should be written in presence of his Method of recording the declaration.

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* *Náreda,* cited in the *Vivádatandava, Vyavahâramayúc'ha, Smritichintámani,* and *Veeramitrodaya.*

† *Náreda,* cited in the *Vivádatandava, Vyavahâramayúc'ha, Veeramitrodaya, Smritichintámani,* and *Vivádárnavasetu.*

‡ In the Hindu law, the same term which signifies a judicial proceeding generally, applies both to civil actions and criminal prosecutions; and as the method of conducting the investigation is in both cases the same, it will be necessary to use the terms "charge," "declaration," &c., with reference to the subject-matter.

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adversary, distinguished by the year, month, fortnight, day, time, tribe, &c."*

Declaration what to contain.

2. What is declared or alleged is the thing to be proved. The person declaring or alleging is the plaintiff, or the complainant. His adversary is the defendant, or party complained against. "*Should be written in his presence:*" before his face. "*As represented:*" in the same manner as the statement was made at the time of making the first representation; not otherwise, for if there is any variation, it may prove fatal to the cause.†

Causes of non-suit.

3. A prevaricator, one who needlessly attempts to vitiate the proceedings, one who does not adduce his evidence, one standing mute, and one who being summoned absconds, are five persons who are to be non-suited.

Reasons for a second record of the complaint.

4. As the statement of the complainant was taken down in writing at the time of making the original representation,

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* *Yájnyawalcya*, cited in the *Dipacalicá*, *Veeramitrodaya*, *Smritichandricá*, *Vyavahâramayûc'ha*, *Vivádatandava*, *Mádhaviya*, *Smritisára*, and by *Apáraditya*, *Vishwarúpa*, *&c.*

† Formerly, all actions (in the Common Pleas, at least, than the common court for determining civil suits between subject and subject) were commenced by original writ. This original writ contained, pretty much at length, the nature of the injury which the plaintiff had sustained. Upon this, processes of different kinds, adapted to the species of the original writ which the plaintiff had made use of, were sued out, directed to the sheriff of the county where the defendant resided, to cause him to come into court; and then the plaintiff was to make his declaration, which was nothing more than an exposition of the original writ, enlarged by a specification of *time* and *place* and other circumstances,

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it would seem superfluous to enjoin that they should be again written; but at the second writing more particulars are mentioned, as of the year, month, fortnight, day, moon's age, and day of the week, name of the complainant and of his adversary, their tribes, whether Brahminical or the like.

5. By the term, other particulars, is meant the quality, quantity, time, place, motive of forbearance, &c., as has been stated: "That is termed a charge or declaration which is significant, technically precise, comprehensive, unconfused, direct, unequivocal, conformable to the original complaint, probable, uncontradictory, clear, susceptible of proof, concise, not deficient, not at variance with respect to place and time, comprising the year, season, month, fortnight, day, hour, country, situation, place, neighbourhood, the complaint and its nature, the tribe, appearance, and age of the adverse party, the dimensions and quantity of the property in dispute, the names of the complainant and his adversary, the names of their respective ancestors, and of the ruling kings, the motives of forbearance, the grievance done, and the names of the original acquirer and grantor."* Further particulars to be comprised in the declaration.

6. All this being represented to the king, is termed the declaration or charge. At the time of originally preferring the complaint, the subject only is stated; and before the adversary, the particulars of the year, month, date, &c. are Difference between the first complaint and the declaration.

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but so as not to vary materially from the writ, which if it did, would have made the writ, and consequently the suit founded thereon, ineffectual and nugatory.—*Summary Treatise on Pleading.*

* *Cátyáyana*, cited in the *Smritichintámani*, and *Vivádatandava*, *Vyavahâramayúc'ha.*

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inserted. This constitutes the difference [between the original complaint and the declaration.]

Cases in which the date should be specified.

7. Although the specification of the year is not requisite in all cases, yet in the instance of pledge, acceptance, purchase, and sale, it is indispensable to the decision, as appears from the following text: "In the case of a pledge, gift, or sale, the prior transaction has the greater validity."* In mercantile transactions also, if a person had received in a certain year, a certain quantity of a certain article which he restored, and in another year he had received precisely the same article, and of the same quantity from the same person, and if being sued, he should admit the receipt, but plead restoration, it would be necessary for the plaintiff to rejoin, that the restoration was of that article delivered in the former year. The month, and so forth, also should be specified.

Cases in which local circumstances should be specified.

8. The specification of the country, the local circumstances, spot, &c. as well as of time, is requisite in cases of immoveable property, as appears from the following text: "The country, place, site, tribe, name, neighbourhood, dimensions, nature of the soil, the names of ancestors and of the former kings: these ten should be specified in a suit for immoveable property."†

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* Quotation from an uncertain author in the *Vivádatandava, Veeramitrodaya, Vyavahàramatrica*, and *Vivádachandra*; but from *Yájnyawalcya* in the *Mitácshará* and *Smritisára*; and the reading of the text is different by several authors.

† *Cátyáyana*, cited in the *Smritichandricá, Calpataru*, and *Smritichintámani*; but an unnamed author in the *Vivádatandava* and *Vyavahàramayúc'ha*.

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9. "*The country*:" central region, and so forth, or otherwise. "*Place*:" city of Benares, or the like. "*Site*:" the houses or lands by which the property is bounded on all sides. "*Tribe*:" the order of the parties, whether Brahminical or other. "The *name*:" as *Devadatta*, or the like. "*The neighbourhood*:" the persons who reside in the vicinity. "The *dimensions*," in *beegahs* or other land measure. "*Nature of the soil*:" rice fields, plantation of betel-nut, muddy or clayey soil. "*The names of ancestors*," and "*of the former kings*:" the designations of the ancestors of the parties, and also of the former reigning powers. By prescribing the specification of the year, month, &c., it is only intended, that the dates should be inserted as far as may be requisite in particular cases. Explanation of the text.

10. The above being the requisites of a declaration, it follows, that, if it is deficient in any of these requisites, it becomes merely the semblance of a declaration. This semblance of a declaration has not been separately defined by the venerable author, but by others it has been accurately defined: "Declarations should be rejected as mere semblances, which are absurd, uninjurious, unmeaning, frivolous, unsusceptible of proof, at variance with possibility."* Semblance of a declaration.

11. "*Unnatural*:"† as, Such a person has taken the horn of my hare, and will not restore it. "*Uninjurious*:" as Explanation of the preceding text.

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* *Cátyáyana* in the *Smritichandricá*, *Mádhaviya*, *Vyvahâramátrica*, but *Náreda* in the *Smritisára*, and uncertain in the *Vivádatandava*, *Vyavahâramayûc'ha* and *Vivádachandra*, and *Vrihaspati* in the *Smritichintámani*.

† The following illustrations may seem frivolous; but other systems descend to similar *minutiæ*. For instance, A condition precedent of which the subject is an event physically impossible at the time of enter-

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Such a person transacts business in his own house by the light of a lamp which burns in mine. "*Unmeaning*," [not having any signification :] as, the unmeaning connection of letters. "*Frivolous* :" as, This *Devadatta* warbles a sweet song near my house. "*Unsusceptible of proof* :" as, *Devadatta* ridicules me by a supercilious look: as this cannot be proved, it is termed, unsusceptible of proof; from the momentary nature of the action, no witnesses can be procured; much less written evidence; and from the trifling nature of the complaint, an ordeal cannot be resorted to. "*At variance with possibility* :" as, This dumb man cursed me: or at variance with local interest : "That complaint which is prohibited by the government, or detrimental to the interests of a city or country, or to the different classes of society, is pronounced to be inadmissible."*

A declaration is admissible, though involving many matters.

12. But the text, "A declaration comprising several distinct subjects is inadmissible,"† is not intended to vitiate a

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ing into the contract, renders the contract null, if it refer to an act to be done : and is itself null, leaving the obligation pure and simple, if it refer to the act as not to be done. Thus if a man make a promise or a grant under a condition that the grantee do scale the sky, touch the moon, draw a triangle without angles, travel over Britain in an hour, go from Westminster to Rome in a day, the promise or grant is void. But one made upon condition that he do not scale the sky, nor touch the moon, &c. is valid and unconditional, the condition being nugatory.—*Colebrooke, Obligations and Contracts*, Book 3, §§ 203.

* *Náreda* cited in the *Smritisára*, but *Vrihaspati* in the *Smritichintámani*, *Mádhaviya*, *Viramitrodaya*, and uncertain in the *Vivádatandava*, *Vyavaháramayúc'ha*, and *Vivádachandra*.

† Quotation from *Náreda* in the *Vivádatandava*, but from *Cátyáyana* in the *Mádhaviya*, *Smritichandricá*, *Calpataru*, and uncertain in the *Vyavaháramayúc'ha*, *Smritisára*, and *Vivádachandra*.

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claim involving many distinct articles: for instance, if a man should sue another for taking his gold, cloths, silver, &c., there is no error in the declaration. Nor should it be alleged, that a declaration involving a claim of debt combined with other topics is invalid: as for instance, if one should allege, "Such a one has borrowed silver money from me at interest; gold has been deposited with him, and my field has been usurped by him." Such a declaration is good. All that is intended is to invalidate a simultaneous investigation. "It being ascertained, that in a judicial proceeding there are allegations of various matters, the king being desirous of investigating the merits, may enter upon them at pleasure."* Hence the meaning of a declaration involving many topics being inadmissible, is, that they should not be entered upon all at once.

The term plaintiff or complainant includes their sons, grandsons and agents.

13. The term plaintiff or complainant includes the sons and grandsons of those persons, their interests being equally involved; so also is a constituted agent included, because his appointment creates in him a similar interest, as appears from the following text: "A person being appointed by the plaintiff or complainant, or deputed by the defendant, or person complained against, who acts on behalf of his principal, suffers defeat or success."† The principal participates in the success or failure of his representative.

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* Cited in the *Vyavahàramayúc'ha*, *Smritisára*, *Mádhaviya*, *Vivádachandra*, and *Veeramitrodaya*.

† *Náreda*, cited in the *Vyavahàramayúc'ha*, *Smritichintámani*, *Calpataru*, *Smritisára*, but *Catyáyana* in the *Smritichandricá*.

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Mode of recording the declaration.

14. This (the declaration) having been written on the ground, or on a board with chalk, is to be corrected by the rejection of superfluities, and afterwards recorded on a leaf, as appears from the following text of *Cátyáyana:* "The judge shall cause to be taken down the spontaneous statement of the plaintiff or complainant on a board with chalk, and afterwards, being corrected, on a leaf."*

Corrections may be made until the answer is given in.

15. The declaration may be amended until the answer is given in, but not afterwards, lest there should be infiniteness. Hence the text of *Náreda:* "He may amend his declaration until the answer is given in; but being stopped by the answer, the corrections must cease."†

Answer must not be taken before the declaration has been amended.

16. If the judges cause the answer to be given in before the declaration is amended, they incur the penalty prescribed for anger and avarice; and the king must investigate the claim, after having obtained a fresh declaration.

Section 5.

Of the Answer.

Answer to be written.

1. What is to be done after the amended declaration has been recorded, is next propounded: "The answer of the party who has heard the declaration must be written down in the presence of the plaintiff."‡

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* Cited in the *Vyavahúramayúc'ha, Smritichintámani, Dipacalica, Mádhaviya, Vyvahúramatrica.*

† Cited in the *Vivádatandava, Vyavahúramayúc'ha, Mádhaviya, Vivádárnavasetu, Vivádachandra,* but *Cátyáyana* in the *Smritisára.*

‡ *Yájnyawalcya,* cited in the *Vivádatandava, Vyavahúramayúc'ha, Smritichintámani,* and *Smritisára.*

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2. The adverse party having heard the substance of the declaration, his answer, or that which follows the declaration, is to be written down in the presence of the plaintiff, that is, the claimant or complainant. Explanation.

3. That which is calculated to refute the first statement is an answer, as appears from the following text: "The wise have held that to be an answer which embraces the declaration, which is solid, clear, consistent, and obvious."* Requisites of an answer.

4. "*Which embraces the declaration*:" capable of refuting it. "*Solid*:" not inconsistent with reason. "*Clear*:" not admitting of doubt. "*Consistent*:" agreeing in all its parts. "*Obvious*:" that which needs not the explanation which would be required by the use of uncommon words, or by ungrammatical terminations or collocation of words, or by the use of elliptical phrases or of a foreign dialect. Such has been termed a true answer.† Further explanation.

* *Náreda* (not found in his Institutes) cited in the *Vivádatandava*, *Vyavahéramayúc'ha*, *Smritichintámani*, *Smritisára*, *Vivádárnavasetu*, *Vivádachandra*, *Veeramitrodaya*, *Calpataru*, and *Prajapati* in the *Smritichandricá* and *Mádhaviya*.

† The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally, *mutatis mutandis*, with regard to other parts of pleading,) are, 1st. That it be single, and containing only one matter; for duplicity begets confusion. But by stat. 4 and 5 Anne, c. 16, a man with leave of court may plead two or more distinct matters or single pleas. 2d. That it be direct and positive, and not argumentative. 3d. That it have convenient certainty of *time*, place, and persons. 4th. That it answer the plaintiff's allegations in every material point. 5th. That it be so pleaded as to be capable of trial."—Law Dic. Art. Pleading.

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Four kinds of answer.

5. An answer is four-fold, a confession, a denial, a special plea, and plea of former judgment, as *Cátyáyana* has declared: A confession, a denial, a special plea, and a plea of former judgment, are four sorts of answer."*

Nature of confession.

6. A confession is exemplified as follows: The plaintiff declares, "This person is indebted to me in a hundred pieces of silver," and the other replies, "It is true, I do owe him that sum," as *Cátyáyana* has said: "The admission of a claim is termed a confession."†

Of denial.

7. A denial is thus, "I do not owe him," as *Cátyáyana* declares: "In law that answer is termed a denial, when the defendant or accused contradicts the charge or declaration."‡

Denial is four-fold.

8. The answer by denial is four-fold, "total contradiction, plea of ignorance, of *alibi*, and of non-existence at the period of the alleged transaction."§

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* Cited in the *Vivádatandava*, &c., and *Náreda* in the *Calpataru*.

† *Vyasá*, cited in the *Vivádachintámani* and *Veeramitrodaya*, but uncertain in the *Vivádatandava*.

‡ *Smritichintámani*, *Vivádatandava*, *Smritisára*, *Vivádárnavasetu*, *Vivádachandra*, *Smritichandricá*, *Vrihaspati* in the *Calpataru*, and *Mádhaviya*, *Náreda* in the *Vyavahâratatwa*.

§ *Cátyáyana*, in the *Vyavahâramayúc'ha*, *Vivádatandava*, *Smritichandricá*; *Náreda*, in the *Smritichintámani* and *Smritisára*; *Vyasá*, in the *Calpataru* and *Vivádamatrica*; *Prajapati*, in the *Mádhaviya*; but uncertain in the *Vivádachandra*.

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9. "A special plea," is, where the defendant admits the demand, but avoids it by pleading a general acquittance, or that he had received the money as a present, as *Náreda* has said: "Where an adversary admits a claim adduced in writing by a complainant, but avoids it by some specific circumstance, that is called a special plea."* Nature of a special plea.

10. "The plea of former judgment," is, when the adversary asserts that the complainant had formerly made a complaint against him in the same matter which was dismissed, as *Cátyáyana* has said: "One against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by a plea of former judgment."† Of plea of former judgment.

11. These being considered as the component parts of an answer, it follows that an answer not comprising these requisites is a mere semblance. This is a natural inference, but in other law tracts it has been expressly declared: "That is not an answer which is dubious, not to the point, too confined, too extensive, or not embracing all the parts of the declaration. That which is relative to other matter, incomplete, obscure, confused, not obvious, or absurd, is a faulty answer."‡ Semblance of an answer.

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* Cited in the *Vyavahâramayúc'ha*, *Vivádatandava*, *Smritisára*, *Smritichandricá*, *Veeramitrodaya*, *Vivádárnavasetu*, and *Vivádachandra*; but *Vrihaspati*, in the *Mádhaviya*, or both according to the citation in the *Calpataru*.

† Cited in the *Smritichintámani*, *Vyavahâramayúc'ha*, *Vivádatandava*, *Smritisára*, *Vivádárnavasetu*, and *Vivádachandra*; but *Vrihaspati*, in the *Calpataru* and *Mádhaviya*.

‡ *Náreda*, in the *Smritichintámani* and *Vivádatandava*, but uncertain in the *Vyavahâramayúc'ha*.

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Explanation. 12. "A *dubious* answer" is thus exemplified: as if in an action for debt, the plaintiff demanding 100 *suvernas*,* the defendant should admit that he is indebted in the sum of 100 *suvernas* or 100 *mashas*. "*Not to the point*:" as if in an action for debt of 100 *suvernas*, the defendant should reply by admitting a debt of 100 *panas*. "*Too confined*:" as if in an action for debt of 100 *suvernas*, the defendant should answer by admitting that he owes five. "*Too extensive*:" as if in an action for 100 *suvernas*, the defendant should reply by admitting a debt of 200. "*Not embracing all the parts of the declaration*:" as if in an action for gold, cloths, and other articles, the defendant should reply by merely admitting the debt of the gold, but of nothing else. "*Which is relative to other matter*:" as if in an action for debt of 100 *suvernas*, the defendant should answer that he had been assaulted by the plaintiff. "*Incomplete*:" not embracing the particulars of country, place, and so forth; as if in an action to recover a certain field, the declaration should specify it as being situated in the central province to the eastward of the city of Benares, and the defendant in answer should admit generally having taken possession of a field, without specification. "*Obscure*:" as if in an action for 100 *suvernas*, the defendant should answer, Am I alone in debt to this man? which might signify that the chief judge, the assessors, or the plaintiff, were indebted to another person. "*Confused*:" contradictory in its parts: as if in an action for a debt of 100 *suvernas*, the defendant should answer that he received the money, but that he does not owe it. "*Not obvious*:" requiring

* A weight of gold equal to sixteen *mashas*, which at five *rutties* to each *masha*, makes the *suverna* equal to about 176 grains Troy.

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explanation, in consequence of the use of ungrammatical composition, or collocation, or of a foreign dialect: as if a person being sued for a debt incurred by his father to the amount of 100 *suvernas,* should answer, "By the information of the receiver of the hundred of my father, I know nothing of the *suvernas*:" instead of saying, I did not learn from my father that he received the 100 *suvernas.* "*Absurd*:" contrary to reason and common sense: as if in an action for debt, the plaintiff should claim the sum of 100 *suvernas* alleged to have been lent out at interest, stating that he had received the interest, but not the principal, and the defendant should answer that he had paid the interest, but had not received the principal.

Confusion of pleas inadmissible.

13. By using the term answer in the singular number, it follows that a confusion of pleas is inadmissible. "That answer which confesses to a part, specially excepts to a part, and denies a part, is not a proper answer, from its confusion."* The above is a text of *Cátyáyana,* who has propounded the reason why such answer is improper: "In one suit, the proof cannot rest on both parties, nor can both obtain judgment, nor can two answers be offered at once."†

Case of a denial and special exception.

14. But it might be contended, that in an answer involving denial and a special exception, the proof would rest with both parties; for as it has been recorded, that "in the case of a total contradiction, the proof rests with the com-

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* Cited in the *Smritichandricá, Vyavahárамayúc'ha, Vivádatandava,* and *Veeramitrodaya.*

† Ibid.

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plaintant, and in the case of a special exception, with his adversary."* Both pleas, however, cannot be admitted in one case: as if in an action for debt of 100 *suvernas*, and also of 100 rupees, the defendant should deny the first claim, and specially except with regard to the second.

Case of a former judgment and special exception.

15. On the other hand, in the case of an answer involving a special exception and a former judgment, the defendant must substantiate both pleas, as has been said: "The proof rests with a defendant pleading a former judgment and a special exception."† As if one should say, I received the gold, but returned it; and as to the silver, I was sued in a former action, and judgment was given against the plaintiff. But this is incompatible, because the first plea must be substantiated by the decree and the adjudicants, and the second by witnesses and documents.

Case of an answer involving three or four pleas.

16. An answer involving three pleas is now to be considered: as if in an action to recover 100 *suvernas*, 100 rupees, and cloths, the defendant should deny the first claim, plead an acquittance as to the second, and former judgment as to the cloths; and so with an answer involving four pleas. These, when brought forward all at once, constitute no answer.

Must be taken separately.

17. But as the several counts cannot be answered without their respective pleas, these must be urged separately in succession.

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* *Náreda* in the *Vyavahàramayúc'ha*, but uncertain in the *Vivàdatandava* and *Mádhaviya*.

† *Vyasá* and *Harįta* in the *Vyavahàramayúc'ha*, but uncertain in the *Vivàdatandava* and *Vivàdachandricá*.

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18. Their order will be regulated by the inclination of the parties and the judges; but in the case of two pleas coming together, that which is most important should first be acted upon, proceeding afterwards to that which is less important.

The most weighty plea should be first examined.

19. But where there is a confession in conjunction with another plea, issue is to be taken on that other plea, because there is not proof required to a confession, as *Hareeta* has declared: "If it should be asked, Which plea is to be first considered, when there is a junction of a total denial and a special plea, or of a confession with another plea? the reply is, that which is most important, or which is most material to the decision of the suit, is to be taken as a distinct answer, or else otherwise:"* that is to say, where there is no distinction, the order is regulated by the inclination of the parties.

Confession to be acted on after all other pleas.

20. The meaning of "that which is most important" is next propounded. In an action to recover 100 *suvernas*, 100 rupees, and cloths, if the defendant should confess the first claim, totally deny the second, and plead a release for the third, here the total denial, from its being the most important, being acted upon by taking the plaintiff's proof, the investigation must proceed. The third plea regarding the cloths, follows next. The same order is to be preserved in the case of its junction with a denial, or a plea of former judgment, or a special exception: as if in a suit of the nature

The term "most important plea," means that which is followed by most proceedings.

* Cited in the *Smritichandricá*, *Mádhaviya*, *Vyavaháramayúc'ha*, *Vivádatandava*, and *Smritisára*. He and *Vyása* in the *Vyavaháramayúc'ha;* but uncertain in the *Vivádachandrá;* and *Vyása* in the *Calpataru*.

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above-specified, the defendant should confess the debt of the gold and silver, and declare himself willing to repay it, but should deny with respect to the cloths, or should plead restoration of them, or that judgment was given against the plaintiff in a former action for them; here, although the confession involves the most weighty matter in dispute, yet as it is followed by no adducement of evidence, the denial or other pleas are first to be considered in the investigation of the suit.

In a case of two pleas applying to one and the same count, proof rests with the defendant.

21. But in a case where two pleas apply to one and the same charge, as if a person should arraign another, alleging that he had lost at a certain time a certain cow belonging to him, which had subsequently been found in the house of the other, and the defendant should assert that the allegation is false, and that the cow was in his house previously to the period mentioned by the plaintiff, or that it had been born in his (the defendant's) house. This should not be called a faulty answer, because it is calculated to rebut the charge: it is not a simple denial, as it involves a justification; nor is it a special exception, as it does not admit any part of the allegation; but it is an exculpatory negation, and the proof rests with the defendant, in conformity to the rule prescribing that the proof of justification depends on the defendant.

And not with the plaintiff.

22. But if it be objected, that this might as well be alleged to be the business of the plaintiff, as is prescribed in cases of denial, it is answered, that the rule in question relates only to cases of simple denial. Should it be rejoined, that it might as well be affirmed that the rule prescribing

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the proof to rest with the defendant, also relates only to a simple special exception, the answer is, that this is incorrect, as a special plea involves a denial, and there is no such thing as a simple special plea.

Distinction between an exculpatory negation and a simple denial.

23. In general, a special plea consists partly of admission, and partly of denial; as for instance, an admission of the receipt of 100 rupees, but succeeded by a plea neutralizing the admission : but in the instance above quoted, there is no partial admission, which constitutes the distinction. This has been clearly stated by *Hareeta:* "When an answer involves a denial and a special plea, the special plea is to be first considered."*

Proof rests with the defendant, in pleading denial and former judgment.

24. Where the pleas of denial and former judgment apply to the whole matter charged, there also the proof rests with the defendant; as in an action for the recovery of 100 rupees, if he should deny, and at the same time plead former judgment; as appears from the following text: "In the junction of a denial with a special plea or former judgment, the defendant should adduce the proof."† There is no such thing as a pure plea of former judgment, for this would be no answer.

A confession is a good answer.

25. But a confession is a good answer by itself, because by establishing the truth of the matter adduced to be proved, it excludes the necessity of proving it.

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* Cited in the *Mádhaviya* and *Smritichandricá*, but *Vyása* in the *Calpataru*.

† *Hareeta* and *Vyása* cited in the *Vyavahâramayúc'ha*, but uncertain in the *Vivádatandava* and *Vivádachandra*.

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In a case of special plea and a plea of former judgment, defendant may select his own plea.

26.* And where there is a junction of a special plea and of a plea of former judgment, as if a person being sued by another for a hundred pieces of money, should reply by an admission of the receipt, a plea of re-delivery, and a plea of former judgment, it is optional with the defendant, [that is, it is optional with him which of the two pleas he will proceed first to substantiate.]

Both parties not to plead at once.

27. But in no instance can two adverse parties plead at the same time in one cause.

Section 6.

Of the Onus Probandi and Judgment.

On delivery of answer, evidence shall instantly be adduced.

1. The establishment of the claim being dependant on evidence, it is propounded by whom that evidence is to be adduced. "The claimant shall immediately reduce to writing the evidence of the thing to be proved."* After the answer, the claimant, that is to say, he who has the matter to prove, shall reduce to writing immediately, without any interval, the evidence, or that by which the matter is to be proved. From the injunction of its being immediately reduced to writing, it may be inferred, that in furnishing an answer, delay is occasionally allowed: this point will be subsequently considered. The meaning appears to be, that, as the necessity of proceeding without delay was not prescribed in the case of giving in the answer, as it has been in the case of recording the evidence, time is occasionally allowed in pre-

* *Yájnyawalcya*, cited in the *Smritichandricá*, *Vyavahàramayúc'ha*, *Mádhaviya*, *Dipacalica*, and *Subodhini*; and by *Mitramisra*, *Viswarúpa*, and *Balambhatta*.

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paring the answer to the claim on the principle of "*expressio unius est exclusio alterius.*"

2. From the direction that the claimant shall reduce to writing, &c. it follows, that he is to write down the evidence of the matter adduced who has anything to prove: hence, when former judgment is pleaded, as this is the matter to be proved, he who adduces that plea is the claimant. He (the defendant) therefore is considered as the claimant, and he must adduce the evidence. In a special exception also, as this is the thing to be proved, he who adduces that plea is the claimant, and he is the person to adduce the evidence.

In case of a former judgment or special plea, the defendant adduces proof.

3. But in a case of total denial, the plaintiff is the claimant, and it rests therefore with him to adduce the evidence: hence, by the use of the expression "the claimant shall reduce to writing," it is meant, that he who has any thing to prove, is to do so, and not any other person.

In a total denial, the plaintiff.

4. Therefore, in a confession, as there is nothing to be proved, and neither of the parties have any claim, there is no evidence to be adduced, and the proceeding rests there, as has been clearly expressed by *Hareeta:* "When a special exception and former judgment are pleaded, the defendant shall adduce the proof: in a total denial, the plaintiff: in a confession, there is no issue."*

In case of a confession, no evidence requisite.

5. "That being right, he obtains judgment; and otherwise, the reverse."† "That" means proof, consisting of

Judgment must be given after adducement of evidence.

* *Vyása* in the *Calpataru*, and in the *Vyavahâramayúc'ha* as the text of *Vyása* and *Hareeta*, but uncertain in the *Vivâdatandava* and *Vivâdachandra.*

† This is the latter hemistich of a text of *Yájnyawalcya*, cited in

documents, testimony, &c. as will be subsequently explained. That is, by the establishment of the accuracy of his evidence, whether oral or documentary, a party obtains judgment, consisting in the success of his claim. He obtains the reverse, or defeat, consisting in the loss of his claim, if it should happen otherwise.

SECTION 7.

Recapitulation.

Recapitulation. 1. Having propounded summarily the nature of judicial proceedings, the author concludes the subject by a recapitulation: "This judicial proceeding, exhibited relatively to causes in general, consists of four parts."* The judicial proceeding here alluded to (identical with those which the king is enjoined to investigate) is exhibited or explained as being divided into four parts, relatively to causes in general, whether actions for debt or others.

Quadruple division of a judicial proceeding. 2. "The declaration of the complainant should be written in the presence of his adversary." This is termed the first division, or "the declaration." "The answer of the party who has heard the declaration must be written down in the presence of the complainant." This is the second division, and is called the answer. "The claimant shall immediately reduce to writing the evidence of the thing to be proved." This is the third division, and is termed the proof. "That being right, he obtains judgment; and otherwise, the reverse." This is the fourth division, and is termed the judg-

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the *Smritichintámani*, *Vivádatandava*, *Dipacalica*, and *Subodhini*; and by *Balambhatta* and *Mitramisra*.

* *Yájnyawalcya*, cited in the *Smritichandricá*.

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ment, as has been declared, "That is called a judicial proceeding which, in the conflicting interests of mankind, furnishes a decision grounded on law and equity."* "It has four divisions, namely, the declaratory, replicative, probatory, and adjudicative, and is termed quadruple."†

3. But in the case of a confession, as there is no adducement of evidence, and as the claim does not require to be substantiated, there is no issue, and the proceeding has only two divisions. **Exception in case of confession.**

4. The deliberation of the judges for the purpose of ascertaining, after the delivery of the answer, to which of the parties the adducement of evidence belongs, does not form a distinct division of the proceeding, not having been propounded as such by the venerable author,‡ and not being an act dependant on the parties themselves. Thus is concluded the general introduction to judicial proceedings. **Judicial deliberation, not a distinct division of the proceedings.**

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* *Mádhaviya* and *Smritichandricá.*

† *Vyavahára mayúc'ha* and *Smritichandricá*, and by *Aparaditya.*

‡ *Yájnyawalcya.*

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CHAPTER II.

Of Retort or Recrimination.

SECTION I.

1. Thus having propounded the general introduction to a judicial proceeding, which is common to all, the author proceeds to notice certain distinctions which prevail in particular cases. "A person arraigned, not having cleared himself from the declaration, shall not retort; nor shall a person charge another who is already labouring under a charge, nor shall he introduce anything foreign to his original complaint."* Retort, &c., prohibited.

2. That with which a person is charged, is the declaration: and the person arraigned, not having cleared or acquitted himself, shall not recriminate or retort on the complainant. Explanation of the first part of the text.

3. But the objection does not apply to a plea of former judgment, as it involves the exoneration of the party complained against, although it is in some measure a retort: hence it is apparent, that the restriction is confined to a retort not having a tendency to refute the charge. Recriminatory plea permitted, when exculpatory.

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* *Yájnyawalcya*, cited in the *Mádhaviya*, *Smritichandricá*, *Smritisára*, *Dipacalica*, and *Subodhini*; and by *Balambhatta* and *Mitramisra*.

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Explanation of the last part of the text.

4.* Having thus restricted the party complained against, he proceeds to apply some observations to the complainant. A complainant shall not charge another with a matter which has been already charged against him, and of which he has not cleared himself, nor shall he introduce anything foreign or contrary to what had been alleged at the time of his originally preferring the claim. It is declared, that whatever fact, in whatever manner it may have been represented at the time of preferring the original claim, that same fact should be reduced to writing in the same manner at the time of recording the declaration.

Objection replied to.

5. But [should it be objected,] that by formerly enjoining that the writing in presence of the party complained against must be the same as the original claim, it is consequently superfluous to repeat, that anything foreign to that which has already been represented should not be introduced; the reply is, that the former text merely enjoins the necessity of recording the same subject as had been stated by the plaintiff at the time of his making the original claim, and not another subject in the same cause; as if the plaintiff, at the time of his preferring the original claim, should have declared that a certain person owed him the sum of 100 rupees with interest, he should not declare in presence of the adverse party at the time of recording the declaration, that the debt consisted of a hundred pieces of cloth with interest.

Distinction between this and a former text.

6. Should he do so, this would be entering on another subject, the penalty of which would be non-suit and fine. But the text prohibiting the introduction of anything foreign to the original claim prohibits also the shifting the nature of

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the proceeding, even though the subject of the proceeding be the same: as if the plaintiff, at the time of his making the original claim, should declare that another had borrowed 100 rupees from him at interest, and that he would not repay it; and at the time of recording the declaration, he should charge his adversary with having taken by violence the same sum; consequently, in the former instance, there is a prohibition against introducing a new subject, and in the latter a prohibition against entering on a new ground of action.

7. This has been clearly defined by *Náreda:* "That man who forsaking his original claim rests on other grounds, is to be non-suited by reason of the confusion of his proceedings."* Text of *Náreda.*

8. One who is non-suited is to be fined, but he does not therefore forfeit all claim to the subject-matter. Consequently the injunction here introduced, "a person arraigned not having cleared himself," &c. is merely intended as admonitory to the parties against error, but it does not affect the validity of the original claim. Hence the ordinance subsequently declared, "The king shall investigate judicial proceedings in a *bonâ fide* manner, divested of inadvertencies."† **Non-suit does not invalidate the claim.**

9. This must be understood as having relation to a civil action; but in criminal prosecutions an error is fatal to the **Difference in the case of a civil action from a criminal prosecution.**

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* Cited in the *Smritichandricá, Vyavahâramayúc'ha, Vivádatandava, Veeramitrodaya, Calpataru,* and *Mádhaviya.*

† *Yájnyawalcya,* cited in the *Smritichintámani, Vivádatandava, Subodhini,* and *Dipacalica;* and by *Viswarúpa, Mitramisra,* and *Balambhatta.*

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cause, as *Náreda* has declared: "A verbal error is not fatal in civil actions: should it appear in actions brought for seduction, or for debt, or for landed property, the plaintiff is to be amerced, but it does not annul his claim."* The meaning of this is, that in all civil suits, not involving criminal proceedings, a verbal error, or the appearance of inadvertency, is not fatal, or not destructive of the claim; that is to say, the original claim is not rendered void. The example given is an action for seduction, &c.

Error fatal to a criminal prosecution, though not to a civil suit.

10. As in actions for seduction, or for debt, or for landed property, by the appearance of inadvertency, the plaintiff is to be fined, but his original claim is not rendered void, so in all civil actions. From the specification of the term civil actions, it is inferrible, that in the case of a criminal prosecution, error is fatal to the cause. As if a man, at the time of making his original complaint, should assert that he had been kicked on the head, and at the time of recording his charge, should allege that he had received a blow of the fist on his foot. In this case, he is not only to be amerced, but his cause is to be dismissed.

Exception to the rule against recrimination.

11. An exception, however, is propounded to the rule against recrimination previously to the refutation of a charge: "He, the person complained against, may recriminate in charges brought for abuse and assault."†

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* Cited in the *Vyavahåramayúc'ha*, *Vivådatandava*, *Mádhaviya*, and *Veeramitrodaya*.

† *Yájnyawalcya*, cited in the *Vivådatandava*, *Mádhaviya*, *Smritichandricå*, *Dipacalica*, and *Subodhini*, by *Viswarūpa*, *Mitramisra*, and *Balambhatta*.

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12. In prosecutions for abuse, whether verbal or personal, and in assaults, that is, attacks committed with poison or with offensive weapons and the like, recrimination being allowable, the person complained against may, without having refuted the charge brought against himself, recriminate his accuser. **Explanation.**

13. But [should it be objected,] that in this instance it is equally impossible to hear the two allegations at once, because the recrimination involves another complaint; and that it is no answer, because it does not refute the first charge; the reply is, that the recrimination is not used for the sake of trying two different pleas, but for the sake of obtaining a mitigated, or averting a weighty punishment. **Objection replied to.**

14.* As if a person, being charged with having abused or assaulted another, should plead that the complainant was the first aggressor, a mitigation of punishment might be the consequence, as *Náreda* has said: "It is a settled rule, that the first aggressor is the chief delinquent. He also is a wrong-doer who attacks in the second instance, but the punishment of the first party will be more severe."† But where the parties simultaneously aggress, there is no difference in the punishment, as appears from the following text: "If there can be no distinction found between the parties, and the **Example.**

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* This seems analogous to the plea of *son assault demesne*, in the English law; but from what has preceded, it would appear that the equitable doctrine of *set off*, was not recognized in the Hindu code.

† Cited in the *Vivádatandava*, *Mádhaviya*, *Smritichandricá*, and *Veeramitrodaya*.

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abuse, assault, and violence be simultaneous on the part of both, the punishment of both is to be the same."*

Recapitulation. 15. Although it is impossible to try both allegations at once, yet in charges of assault, &c., recrimination is pertinent; but in actions for debt and the like, it is vain. Having thus propounded the law with respect to the parties, he proceeds to declare the duties of the judges and assessors.

SECTION 2.

Of Mesne Process.

Security to be taken for the satisfaction of the award. 1. "A competent surety must be taken from both parties for the satisfaction of the award."† "Both parties," that is, plaintiff and defendant. "A competent surety," one who stands in the same relation to the affair. A representative must be taken from both parties, from the plaintiff and defendant, "for the satisfaction of the award," for the delivery of the sum, or the fulfilment of the penalty adjudged in all proceedings by the judges and assessors.

In default of security, the parties to be guarded. 2. If this be not practicable, persons must be appointed to guard the parties, who are to provide their daily subsistence, as has been declared by *Cátyáyana*: "If a party is unable to furnish a competent surety, he is to be guarded, and at the close of each day is to furnish wages for the service of his guards."‡ Thus the rule for taking security

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* *Dundaviveca*, *Smritichandricá*, and *Veeramitrodaya*.

† *Yájnyawalcya*, cited in the *Vyavahàramayúc'ha*, *Subodhini*, *Vivádatandava*, *Dipacalica*; and by *Viswarúpa*, *Mitramisra*, *Balambhatta*.

‡ Cited in the *Vyavahàramayúc'ha*, *Vivádatandava*, *Veeramitrodaya*, *Dipacalica*, and *Mádhaviya*.

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from the litigant parties has been declared, and it remains to shew the object of this measure.

SECTION 3.

Judgment in Actions for Debt.

1. "In the case of a denial, when the claimant proves his allegation, the defendant, being cast, is to pay the amount, and an equal amount to the king. A person bringing a false claim is to discharge twice the amount of his claim."* A denial of the claim alleged by the plaintiff being made by the defendant, and he being cast, or compelled to submission by the witnesses or other evidence, shall pay the amount claimed to the plaintiff, and to the king an equivalent fine as a mulct.

What judgment to be given against defendant, being cast.

2. But if the plaintiff cannot establish his claim, he becomes the false claimant, and hence he is to pay to the king a fine equal to twice the amount claimed; and the same rule obtains in a plea of former judgment or special plea. In these instances, the plaintiff concealing the fact, and being overcome by the defendant, shall pay a fine to the king equivalent to twice the amount obtained; but if the defendant cannot establish his former judgment and special plea, then he is the false claimant, and being overcome by the plaintiff, is to pay to the king a fine equal to double the amount claimed, and the amount claimed to the plaintiff. In a case of confession, there is no fine.

What judgment to be given against a plaintiff failing to establish his claim.

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* *Yájnyawalcya*, cited in the *Vivádatandava*, *Veeramitrodaya*, *Smritichandricá*, *Dipacalica*, and *Subodhini*, and by *Viswarūpa*, *Mitramisra*, *Balambhatta*.

The text relates only to actions for debt.

3.* The text above quoted relates only to actions for debt, because the fines applicable to other cases have been propounded separately; and it is not applicable generally, because in cases where there is no property claimed, it could not apply; and although there is a special provision, "The debtor shall be caused to pay by the king,"* &c. which also relates to actions for debt, yet that contains a distinction which will be hereafter treated of.

Or it may be interpreted as extending to other cases.

4. Or the text quoted may be admitted to be applicable to all cases, and thus interpreted:—a denial of the allegation being made by the person against whom it is brought, and he being overcome by the evidence adduced by the complainant, shall pay a fine proportionate to the several causes of action. The connective particle may be used affirmatively, and the term "to the king" may be considered as a mere recital. If the complainant cannot prove his allegation, he becomes a false claimant, and shall pay a fine in money equivalent to twice the fine prescribed for each cause of action. In this instance, as in the former, the same rule obtains in cases of a plea of former judgment and special plea.

Section 4.

Special Rule respecting the Answer.

Inference from a former text

1. From the junction, that the "claimant shall immediately reduce to writing the evidence of the thing to be

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* *Yájnyawalcya*, cited in the *Dipacalica*, *Vivádabhangárnava*, *Vivádárnavasetu*, *Mádhaviya*, and *Smritichandricá*.

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proved,"* it may be inferred, that in the delivery of the answer, some delay is permitted.

2. But an exception has been laid down: "In a capital offence, theft, assault, and abuse, [where] a cow [is the cause of action], slander, aggression, women; let him contest immediately;† otherwise, at option." **Exception.**

3. "*Capital offence*," which signifies an attack upon the person or the like, by means of poison or weapons. "*Theft*," petty larceny. "*Assault and abuse*," attack either on the person or character. Its nature will be subsequently explained. "*A cow*," a milch cow. "*Slander*," an accusation tending to loss of caste. "*Aggression*," an attempt either on life or property. This compound has its termination in the singular number, each of the terms composing it being singular.‡ "*Women*," women of family, and slave girls. In the former case, character is involved; in the latter, property. "*Let him contest immediately*." The answer is to be immediately given, and no delay is to be allowed. "*Otherwise*:" in **Explanation of the text.**

* *Yájnyawalcya*, cited in the *Dipacalica*, and by *Balambhatta*.

† Ibid.

‡ When two or more words come together, each in the same case, and which, in the usual mode of construction, would be separated by a conjunction equivalent to "and," they may be formed into a compound of the third species called *Dwundwa*. There are two modes of forming compounds of this species. In the first mode the compound is considered as many, and the last word is therefore put in the dual or plural number; and in the second mode, the aggregate is considered as *one*, and the last member is, consequently, put in the singular number and neuter gender. Wilkins's Grammar, 569. The passage in the text is an example of the latter species of compound.

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other actions, delay in delivering the answer has been declared optional with the parties, or with the assessors and judges.

Section 5.

Indications of Falsehood.

Indications of falsehood enumerated.

1. "One who is constantly shifting his position, licks the corner of his lips, whose forehead sweats, and whose countenance continually changes colour; one whose mouth dries up, and who faulters in his speech; who contradicts himself often; one who does not look up, or return an answer; who bites his lips; one who undergoes spontaneous changes, whether mental, verbal, corporeal, or actual; such a person, whether under a charge or giving evidence, is esteemed false."*

Exposition of the text.

2. "*One who undergoes spontaneous changes or alterations,*" such as are not caused by fear or other passion; "*whether mental, verbal, corporeal, or actual, is esteemed false;*" whether under a charge or giving evidence.

Further explanation.

3. He then explains those changes particularly. "*Who is constantly shifting his position:*" who cannot remain in one place. "*Who licks the corner of his lips:*" who rubs the tip of his tongue about the extremities of his lips. These are actual changes.

Ditto.

4. "*Whose forehead sweats:*" whose forehead is marked with drops of perspiration. "*Whose countenance continually changes colour:*" undergoes an alteration in colour

* *Yájnyawalcya*, cited in the *Subodhini*, and *Dipacalica*, and by *Aparaditya*, *Mitramisra*, *Balambhatta*, *Viswarūpa*.

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from dark to pale. These are corporeal changes. "*One whose mouth dries up, and who faulters in his speech:*" who hesitates, and hardly articulates in his speech. "*Who contradicts himself often:*" whose words are much at variance with each other. These are verbal changes. "*One who does not look up, or return an answer:*" one who does not give a direct answer, and who on being looked at does not look a man full in the face. This is a sign of a mental change. "*One who bites his lips:*" or who contorts them. This also is a corporeal change.*

Those symptoms, not certain or fatal to the case.

5. These are declared to establish merely a probability of falsehood: not a certainty, from the difficulty of distinguishing between changes which have a cause, and those which are spontaneous. Should any intelligent man be able to explain the distinction, even this is not a cause of failure. As people do not perform funeral ceremonies on the appearance of the probability of a person's dying: so, in these instances, although it should appear probable that a person will be defeated, still it is not the proximate cause of defeat.

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* The manner and deportment of witnesses is very commonly a principal ground of assent to or dissent from their testimony, and is doubtless a very rational indication of the existence or want of sincerity. That the disposition of the witness will have an influence on his manner is undisputed; the adequate observation of it is, however, a matter requiring the most skilful and judicious discernment; the detection of affected plausibility, and the assistance of constitutional timidity, are objects which respectively import, in an eminent degree, the administration of justice. Appendix to Pothier, p. 256. And in a subsequent place, a passage from Lavater connected with this subject having been quoted, a citation from Halhed's Code of Gentoo Laws is given, descriptive of symptoms similar to those mentioned n the text.

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Cases of non-suit and fine.

6. Moreover: "One who on his own authority decides a doubtful cause, one who flies, and one who being summoned stands mute, is to be cast and amerced."* *One who on his own authority*, without having recourse to proof: *decides*, by duress or other means, *a doubtful cause:* one in which the claim is denied by the debtor, shall be cast and fined. Being sued after having confessed the claim, or after its being proved against him, *one who flies* or absconds, and being sued and *summoned* by the king, *one who stands mute* in the assembly, are also *to be cast and amerced.*

Explained.

7. "*Whether under a charge or giving evidence, is esteemed false.*" From this text, it might be inferred that a mere ascertainment of probable defeat was intended. The word "*amerced*" has been used to preclude that supposition. The word "*cast*" has been used to obviate the supposition, that such person is only to be amerced, but that he does not incur the forfeiture of his claim.†

Section 6.

Of Conflicting Claims.

Cases of conflicting claims.

1. When two claimants come into court, and simultaneously prefer a claim: as if one person having obtained a field by gift, and enjoyed it for some time, and then on an emergency goes with his family to another part of the coun-

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* *Yájnyawalcya*, cited in the *Dipacalica* and *Subodhini*, and by *Viswarūpa*, *Balambhatta*, *Aparaditya*, and *Mitramisra.*

† In a former verse, chap. ii, Section 1, §§ 9, there was a provision against the forfeiture of the claim in certain cases. The provision for it here is introduced, to shew that such consequence follows in some instances.

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try; and another individual, having obtained the same field by gift, and enjoyed it for some time, goes abroad, and afterwards both of them returning, come into court simultaneously, each claiming the field: in such a case, which of them is to proceed? In answer to that, it is stated:

2. "Both having witnesses, the witnesses of the first claimant are to be adduced. But the first claim being rejected, they will be those of the second claimant."* "*Both*:" Both claimants having witnesses, the witnesses of the first claimant are to be examined. By the first claimant is meant, not the man who makes the first claim, but the person who claims the first gift and occupancy. **Who is to proceed.**

3. But if the adverse party should admit the assertion, saying, that it is true, but that his adversary sold the field to the king, who gave it to him, or that he had received it as a gift from another, to whom it had been given by his adversary, then from the incapacity of the first claimant to offer proof, his claim being rejected, the witnesses of the second claimant are to be examined. The witnesses of the person who claims the second acquisition and occupancy are in this case to be examined. This is the most correct interpretation. **Exception.**

4. It is wrong here to apply the rule, that in case of a denial, the witnesses of the plaintiff, and in the case of a plea of former judgment or special plea, the first claim **General rule not applicable in this instance.**

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* *Yájnyawalcya*, cited by *Viswarūpa*, *Balambhatta*, and *Mitramisra*, and in the *Subodhini*, *Dipacalica*, *Vivádatandava*, *Vyavahára-chintámani*, and *Smritisára*.

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being rejected, the witnesses on the part of the defendant must be examined.

Argument in support of the above opinion.

5. That has been already declared in this, "The claimant shall immediately reduce to writing the evidence of the thing to be proved,"* and in the subsequent texts; and there would be a repetition, if such were the meaning. The distinction has been clearly laid down by *Náreda* in the following texts: "In a denial, the plaintiff is to adduce the evidence: in a special plea, the defendant: and in a plea of former judgment, it is only necessary to produce the decree."† Having recited this text, he proceeds: "Where there are two claimants to one cause of action, and each has witnesses, those of the prior claimant are to be examined."‡ This case being distinct from all others, has been provided for specially.

SECTION 7.

Of an Action attended by Wager.§

A wagering party being cast, must make good the fine and wager, besides the claim.

1. "If the claim be attended by wager, the losing party is to be compelled to pay a fine, his wager, and the thing claimed to the plaintiff."¶ If the claim or judicial proceeding be a wagering one, or joined with a wager or stake,

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* See Chapter ii, Section 3, verse 1.

† Cited in the *Vyavahárachintámani*, but *Cátyáyana* in the *Smritichandricá*.

‡ Cited in the *Vivádatandava*, *Vyavahárachintámani*, and *Smritisára*.

§ This is not exactly the wager of English law; being in fact nothing more than a simple bet on the part of the litigant using it, that he obtains judgment on his side.

¶ *Yájnyawalcya*, cited in the *Subodhini* and *Dipacalica*, and by *Aparaditya*, *Mitramisra*, *Balambhatta*, and *Viswarúpa*.

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then the party who loses, or is cast in such wagering cause, shall be compelled by the king to pay the fine specified, and the wager made by himself, to the king, and to the plaintiff the property forming the subject of the claim.

2. Where any person, influenced by vehemence, engages in the event of his being cast, to pay a hundred *panás*, and his adversary does not engage at all, there also the cause may be proceeded on. Wager may be by one party only.

3. Should the event of that cause prove the wagering party to be cast, he shall be made to discharge his wager, together with a fine. But should the other party be cast, he is only to pay the fine, but not the wager; because the distinction has been observed of the wager made by the party himself. In which case he alone is responsible for it.

4. So, where one party wagers a hundred, and the other fifty; in the event of loss, each party is to discharge his own wager. From the condition expressed, "If the claim be a wagering one," it follows that it may be without wager. Each party responsible for his own wager.

SECTION 8.

Special Rules of Proceeding.

1. "The king shall investigate judicial proceedings in a *bonâ fide* manner, rejecting ambiguity (*C'hala**); but should Trial to be *bonâ fide.*

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* Fraud (*C'hala*), or perversion and misconstruction, is of three sorts: 1st, verbal misconstruing of what is ambiguous; 2d, perverting in a literal sense what is said in a metaphorical one; 3d, generalizing what is particular.—H. T. Colebrooke, on the Philosophy of the Hindus, Trans. R. A. S., vol. i, p. 117.

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the truth not be established according to judicial form, failure ensues."*

Parties must be urged to declare the real facts.

2. Neglecting or casting aside *ambiguity*, or what may have been stated unintentionally, *the king shall investigate or try judicial proceedings in a bonâ fide manner*, according to the real circumstances of the case; and if the facts as they exist in reality be not established or proved according to judicial form, failure ensues, or defeat is the consequence. Therefore it is necessary to proceed according to the real circumstances of the case.

By the judges and assessors.

3. It becomes the judge and assessors to use all means, gentle and other, to induce the parties to declare the truth; in which case a decision may be passed without having recourse to witnesses or other evidence. But as it is impossible in every case to decide agreeably to reality, a decision must be made according to the witnesses or other evidence: this is the alternative.

Two methods of deciding certain and uncertain.

4. As has been declared: "Two methods have been propounded, the one certain, the other uncertain. Certain, is where the real facts of the case are represented; uncertain, is where the facts are doubtfully stated."† A proceeding carried on in the certain mode is the primary one, but the

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* *Yájnyawalcya*, cited in the *Subodhini* and *Dipacalica*, and by *Viswarūpa*, *Balambhatta*, *Aparaditya*, *Mitramisra*.

† *Yájnyawalcya*, cited by *Aparaditya*, *Balambhatta*, and in the *Vivádatandava*.

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uncertain mode is secondary, because a decision passed on the faith of written proof and witnesses may be sometimes correct and sometimes otherwise, for witnesses and other evidence may be false.

5. "Should the truth not be established according to judicial form, failure ensues." An example is now given of this latter part of the text. "In a denial of more than one written claim, if confuted in a part, he shall be made to pay by the king the whole amount of the claim; but that which has not been represented should not be received."* Proof of a part, when the whole claim is denied, is proof of the whole.

6. In a written allegation, comprising more than one, or several claims for gold, silver and cloths, for instance, should the defendant deny or disallow the whole: if confuted, or forced to an admission by witnesses or other evidence in a part of the claim, the gold, for instance, the king shall cause him to make good to the plaintiff the whole, comprising the silver and the other articles specified. But "that which has not been represented should not be received:" that thing which has not been mentioned at the time of making the first representation must not be received; as if the plaintiff should assert that he had forgotten a certain article, his assertion must not be received or attended to by the king. Explanation.

7. This is not merely an express precept; because the defendant is proved to have been false in one instance, and therefore it is presumable that he is false in another; and be- Rule not merely express, but deducible from reasoning.

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* *Yájnyawalcya*, cited by *Balambhatta*, *Viswarúpa*, *Mitramisra*, *Aparaditya*, and *Sulapani*.

cause the plaintiff is proved to have been true in one instance, and therefore it is presumable that he is true in another. The text of the contemplative sage is thus associated with the result of inference, or in other words, probability.

A decision founded on inference being erroneous, no blame attaches.

8. A decision being passed according to reasoning and express law, should it not be conformable to the real merits of the case, the judicial officers are not blameable, as *Goutama* has declared: " Inference is the mode of discovering the truth: relying on that, therefore, let a conclusion be formed. He then proceeds to declare, " that the king and his officers are exonerated from blame" [in such cases.]*

Erroneous supposition noticed.

9. This rule respecting a person who has been confuted in part, must not be interpreted simply to imply the rejection of the defendant's statement; because it expressly declares, that the king shall cause a person who is confuted in part to make good the whole.

Text of *Cátyáyana* has a special meaning.

10. *Cátyáyana* says: " In an action comprising many claims, the creditor shall recover that property only to which he can establish his claim by witnesses or other evidence."† This text relates to the discharge, by the son or other heirs, of debts contracted by the father or ancestor.

To which the above rule does not apply.

11. In this instance, if several claims be preferred against a son or other heir, and he plead ignorance, he is not a denying party; and if confuted in part, he does not incur the impu-

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* Cited in the *Vivádatandava.*

† Ibid. And in the *Vyavahárachintámani* and *Vivádárnavasetu.*

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tation of falsehood. Hence, the text concerning a denial in the case of several written claims, does not here apply, from the absence of denial, and the consequent absence of the required inference.

12. Therefore the latter text of *Cátyáyana* must be considered generally operative in a plea of ignorance, exclusive of the particular ordinance concerning a denial.

Cátyáyana's text refers to a plea of ignorance.

13. " In all actions for debt, and other actions, approaching to certainty,* if more or less be proved, the claim is not fully established."† This is declared by *Cátyáyana:* which means, that a part only of the claim, or more than the claim being proved, by testimony or other means, the whole is not thereby established. Should this text be adduced in opposition, and should it be argued, that the proof of one part of the claim cannot in any case establish that part which is not proved, the answer is, that although the meaning of the text is, that by reason of the necessity of proving the whole claim, the proof of a part or of more by the witnesses adduced does not establish the whole which is to be proved, still from the use of the terms " *not fully established,*" the meaning is, that a doubt remains, and that recourse must be had to other proof. This also is warranted by the text, " rejecting ambiguity."‡

Should the evidence prove more or less than the claim, recourse may be had to other proof.

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* " *Sthiraprayeshoo,* approaching to certainty." Proof in a case of seduction or the like is dependant on evidence, &c. resting on tokens or other weak grounds ; therefore, in such cases there is uncertainty. But in cases of debt and the like, the proof depending on evidence resting on strong grounds, these cases are approaching to certainty.—*Subodhini.*

† Cited in the *Veeramitrodaya*, *Smritichandricá*, and *Vivádatandava.*

‡ Section 2, §§ 1.

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In criminal prosecutions, proof of a part is sufficient for the whole.

14. But in criminal prosecutions, if part of the charge be proved by witnesses adduced to establish the whole charge, in this case the whole charge is proved, because this alone is sufficient proof in such prosecutions, as appears from the following text of *Cátyáyana:* "In cases of adultery and theft, the whole charge is proved, should the witnesses adduced depose to the truth of any part of it."*

Disquisition as to the mode of proceeding when two sacred texts differ.

15. But [should it be objected], that "In a denial of more than one written claim," &c. is one sacred text, and "In an action comprising many claims," &c. is another sacred text;—that here no authority can attach to either, from their opposition to each other, and their being mutually conflicting; and that they cannot be reconciled by applying them to different subjects;—it is answered, that "when two sacred texts oppose each other, that which is most applicable has most weight."† Where two sacred texts contradict each other, the contradiction must be rejected by referring them severally; and that which is applicable, by general or particular inference or otherwise,‡ has most weight or authority. Should it be asked how this applicability is to be made apparent; it is answered, by experience, by ancient experience, showing the relation between cause and effect.§

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* Cited in the *Veeramitrodaya, Smritichandricá,* and *Vivádárnavasetu.*

† *Yájnyawalcya,* quoted by *Sulapani, Balambhatta,* &c.

‡ "*Ootsurgapubadade, lukshuna,* by general or particular inference." The exception supersedes the general rule; and this is the method of construing the universal and special rules: "or otherwise," applicable or not so, by reason of its being appropriate or the reverse to the subject-matter.—*Subodhini.*

§ In logic, *Anwaya* and *Vyatireka:* the first is the relation of events, of which whenever one occurs, the other also occurs; the second

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16. Moreover, in the instance in question, it is proper to apply the rules severally, and in all instances, it is optional to refer rules according to their applicability to particular cases.

To be referred severally.

17. A special exception is propounded to the general rule respecting conflicting authorities: "It is a fixed rule, that the sacred code is of greater authority than the rule of ethics."* Ethical codes, such as those compiled by *Usanasa* and others, indeed, having been already excluded by the text "conformably to the sacred code of laws,"† it follows that the ethical rules here meant are those which treat of the duty of kings, and are included in the sacred code. Where the sacred and ethical codes are at variance, the former is more authoritative than the latter: this is the established rule or definition.

Exception in favour of the sacred code.

18. Although there is no essential discrepancy between the sacred and ethical codes, owing to their conjoint operation; yet, from the superiority of the subject of religious duty, and the inferiority of the moral code, the sacred code is of greater authority: this is the meaning. The superiority of spiritual matters has been exhibited in the commencement of the work.‡ Therefore, when the sacred and eithical codes oppose each other, the latter must give way, and it is not optional to refer them severally.

Superiority of the sacred to the ethical code.

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is the connexion of circumstances, of which when one occurs not, the other also does not occur.—Note to Dig., vol. i, p. 9.

* *Yájnyawalcya*, quoted by *Sulapani*, *Balambhatta*, &c.

† Chap. 1, p. 1, §§ 2.

‡ In the first Chapter of Religious Duties and Ceremonies.

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Certain texts though apparently at variance, not examples of the above rule.

19. What is the example? "A man may unhesitatingly kill a spiritual teacher, or a child, or an old man, or a learned priest, coming with an hostile intent."* There is no guilt at all imputable to the slayer of a person coming with an hostile intent, whether overt or concealed; for wrath meets wrath."† "Let a man in battle strive to destroy a person coming with an hostile intent, even though he may have studied the whole *Vedanta*: by such an act he does not become the murderer of a Brahmin."‡ These are specimens of moral rules. "Having slain a Brahmin unwittingly, such is the prescribed expiation; but there is no expiation permitted to one who wilfully kills a Brahmin."§ These and others are texts of the sacred code. But these extracts should not be quoted as conflicting instances of the sacred and ethical codes, where the former should be held to prevail over the latter.

Because the ethical rules are corroborative merely of the sacred text.

20. For as these two do not apply to the same subject, there is no opposition, and consequently no room to assign relative superiority. "A man may unhesitatingly kill a spiritual teacher, or a child, or an old man," &c. These and the other texts have been merely recited in corroboration of the following texts, commencing, "A Brahmin may take up arms in defence of religion." "In self-defence, and in pefence of sacrificial apparatus, in war, and in guarding Brah-

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* *Menu* and *Vishnu* in the *Vivádárnavasetu*; but uncertain in the *Veeramitrodaya*.

† Uncertain in the *Veeramitrodaya*; but *Cullucabhatta* says, it is the text of *Menu*.

‡ *Cátyáyana* in the *Vivádárnavasetu*, *Veeramitrodaya*.

§ *Menu*, cited by *Cullucabhatta*, &c.

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mins or women, one who lawfully kills another is not culpable."* In defence of oneself, in defence of sacrificial apparatus, or articles requisite to the performance of sacrificial ceremonies, in battle, one who slays another lawfully with sharp weapons, who slays a person coming with an hostile intent against women or Brahmins, is not punishable.

21. A person may slay a spiritual teacher or others whose persons are exceeding sacred, if they come with an hostile intent. *A fortiori* others. From the occurrence of the word "*or*," in the preceding text, and the word "*even*" in a former one prefixed to "though he may have studied the whole *Vedanta*," it is not intended positively to assert that spiritual teachers and the like may be slain.† This meaning also may be gathered from the text of *Soomuntoo*. "There is no crime in killing any one coming with a hostile intent, except a cow and a Brahmin;" and from the text of *Menu*; "A man must not slay a spiritual teacher, an expounder of science, a father or mother, Brahmins, or cows; all these are sacred.‡

Text relating to the killing of a brahmin not to be construed literally.

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* *Menu*, cited by *Cullucabhatta*, &c.

† The whole of this disquisition is rather obscure. The meaning seems to be this. It was declared that where the provisions of the sacred and ethical codes oppose each other, those of the former are to be adopted to the exclusion of the latter; but it is the object of the author to prove that, in the instances cited, although there is an apparent variance, they are really not inconsistent; that they may both stand, if not construed literally; that the provisions of the ethical code, in these instances, should be considered in an hyperbolical sense, and that the authority to slay wilfully, a Brahmin coming with an hostile intent, is not meant to be taken in its literal sense, but is used as an argument, *a fortiori*, to prove the permission of slaying other hostile aggressors.

‡ *Menu*, cited by *Cullucabhatta*, &c.

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But as making an exception in their cases.

22. The text, by applying it to the prohibition of slaying spiritual teachers, and the like, coming with an hostile intent, is rendered pertinent, but not otherwise, as the prohibition to destroy is conveyed generally in the Shasters : "There is no crime in killing any one coming with an hostile intent," &c. This text also relates to other than Brahmins and the like.

General definition of hostile aggressors.

23. For, "an incendiary, one who administers poison, one attacking with a murderous weapon, a robber, one who usurps the land, and one who carries off the wife of another, these six are denominated hostile aggressors."* One intent on destroying by sword, poison, or fire, one who has lifted up his hand in imprecation, one who destroys by means of incantations,† a spy upon the king, an adulterer, a seeker out of blemishes; these and others of the like description are to be considered hostile aggressors. Such is the general definition of an hostile aggressor.

Brahmins and other sacred persons, must in no case be wilfully slain.

24. But Brahmins and the like, being hostile aggressors, may be opposed by a person not meditating their destruction, but for the sake of his own preservation. Should they be destroyed unintentionally, a slight expiation must be performed, but the king does not award any punishment. This, then, being the conclusion, it becomes necessary to adduce another text as the example [of opposition between the sacred and ethical codes.]

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* Cited in the *Veeramitrodaya*, *Vivádárnavasetu*, *Dipacalica*.

† The original has it "by means of the *Athurvaveda*." The *Athurvaveda*, as is well known, contains many forms of imprecation for the destruction of enemies.—*Ward on the Hindus*, vol. i, p. 288.

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25. It is now declared: "The acquisition of a friend is more desirable than the acquisition of gold and land. Therefore a man must strenuously endeavour to obtain that."* This is a rule of ethics. But the sacred code declares, that "the king, divested of anger and avarice," &c.† In these two instances there exists some contradiction: for instance, in a regular judicial proceeding, the acquisition of a friend would be accomplished by prejudging the success of one party; but this would not be conformable to the sacred code, in conformity to which, the success of either party not being prejudged, the acquisition of a friend will be defeated.

Texts exemplifying the above rule.

26. Here then the sacred code is more authoritative than the ethical code; and *Apastamba* has propounded a heavy penance, where ethical and sacred rules interfere with each other, for the person who inclines to the ethical. The penance endures twelve years.

Penance for preferring the ethical code.

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* Uncertain in the *Veeramitrodaya.*

† Chap. i, Sec. 1, §§ 2.

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CHAPTER III.

Of the General Nature of Evidence.

SECTION 1.

1. It has been said: "The claimant shall immediately reduce to writing the evidence of the thing to be proved;" but in anticipation of the question, what is the nature of that evidence? *Text cited.*

2. "Evidence is said to consist of written proof, possession, and witnesses. In the absence of all these, one of the divine tests is prescribed."* *Four sorts of evidence.*

3. Evidence is that by which a matter is established or decided. This is two-fold, human and divine: human evidence is three-fold, writings, possession, and witnesses. Such is the opinion of eminent sages. Writings are of two sorts, official and private. The official sort has already been defined;† *Further division of evidence.*

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* *Yájnyawalcya,* cited in the *Veeramitrodaya, Vyavahárachintámani, Vivádatandava, Vyavaháramayúc'ha.*

† In the first Chapter, treating of Religious Duties and Ceremonies, by the following texts of *Yájnyawalcya*:—"Let a king, having given land or assigned a corrody, cause his gift to be written for the information of good princes who will succeed him." "Either on prepared silk, or on a plate of copper, sealed with his own signet. Having described his ancestors and himself."—*Subodhini.*

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the private will be treated of hereafter. Possession implies enjoyment. Witnesses will be treated of hereafter.

Objection against evidence of possession replied to.

4. Should it be admitted, that writings and witnesses, from their being expressed by language, and from their being comprehended in sound,* may be evidence, but at the same time contended, that possession cannot be evidence, [from the absence of this capacity,] it is answered, that possession is proof, when joined to certain qualities: because purchase or other proximate cause of proprietary right may be inferred from conformity,† or deduced from presumption;‡ and therefore possession is proof, either by inference, or by reason of its not having any independent existence.

In default of other evidence, a divine test to be resorted to.

5. In default of writings and the other two descriptions of evidence, a divine test, the nature and distinctions of which will be treated of hereafter, is propounded as another

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* To the due understanding of this, it is necessary to explain, that according to the *Mimánsa* philosophy, there are three modes of proof: *Prutyukshu*, or the evidence of the senses; *Unnoomanu*, or the evidence from inference; and *Shubdu*, or the evidence from sound.

† *Avyubhicharu*, or conformity, is a term of logic. "In *Hetwabhasa*, there are five divisions, viz., *Suvyubhicharu*, *Viroodhu*, *Sutprutipukshu*, *Usiddhee*, and *Vadhu*. The assignment of a plausible, though false reason to establish a proposition, is called *Hetwabhasa*. Agreement as well as disagreement in locality between the cause and the effect, is *Suvyubhicharu*."—*Ward*, vol. i, p. 409.

‡ *Arthapati*. This is a mode of reasoning peculiar to the *Mimánsa* school of philosophy. Mr. Colebrooke on the Philosophy of the Hindus, observes: "Presumption, *Arthapati*, is deduction of a matter from that which could not else be. It is the assumption of a thing not itself perceived, but necessarily implied by another which is seen, heard, or proved."—*Trans. R. A. S.*, p. 445.

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species of evidence to be resorted to, with due attention to tribe, place, and time. This fact is ascertained from the text above cited: "In the absence of all these, a divine test is prescribed:"* and also from the nature of a divine test, and of its proof having been declared in the scriptures.†

6. But when two claimants come simultaneously into court, the one relying on human evidence, the other on a divine test, he who relies on human evidence is to be first heard, as appears from the text of *Cátyáyana*: "When one adduces human evidence, and the other appeals to a divine test, the king will in this instance proceed to examine the human evidence, and will not have recourse to the divine test."‡ **Human evidence is preferable to a divine test.**

7. Moreover, where there is human evidence to establish the principal part of a claim, there also recourse must not be had to a divine test: as in the case of a denial of a claim for a debt of one hundred pieces of silver borrowed, with interest, should there be witnesses to prove the delivery, but not the amount of it, or the rate of the interest specified, and the claimant should offer to prove these facts by a divine test, here also, conformably to the rule, "In a denial of more than one written claim," &c. a divine test cannot be had recourse to, for the purpose of establishing either the amount of the debt, or the specified interest. **The principal part of a claim being proved by human evidence, recourse should not be had to a divine test.**

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* See *supra*, § 2.

† *Having been declared in the scriptures.* Where there is any visible proof, it is improper to have recourse to that which is unseen: and as the nature of the divine test as proof, is contained only in the scriptures, and it is not palpable to the understanding of the world, so long as there is visible proof, invisible evidence should not be resorted to.—*Sudodhini.*

‡ Cited in the *Veeramitrodaya*, *Vyavahárachintámani*, *Vivádatandava*, *Smritichandricá Vyavahâramadhava*, but *Náreda* in the *Smritichintámani* and *Vyavahâramayúc'ha.*

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The same rule declared by *Cátyáyana*.

8. This has been declared by *Cátyáyana:* "Where human evidence is applicable to even only one part of the case, that is to be received in preference, and recourse must not be had to the evidence of those willing to establish the whole case by divine test."*

Divine test to be resorted to only in default of human evidence.

9. But if there be any text ordaining that a divine test must be resorted to in the trial of secret offences, still that applies only to cases where there is no human evidence: and although *Náreda* has propounded the following rule, "In the case of an aggression committed in a desert, in an uninhabited place, at night, or in the interior of a dwelling, and in the case of a denial of a deposit, divine test must be resorted to,"† this also is applicable only in default of human evidence. This is the general fixed rule: an exception to it will subsequently be shown.

Exception.

10. "In the investigation of aggressiens, or assault and abuse, and in all cases attended with violence committed long ago, the witnesses must be subjected to a divine test."‡

Proof of custom depends on writings.

11. Next are propounded certain rules regarding writings and other evidence. "The proof of established custom, among assemblies of townsmen *(puga,)* companies of traders *(sreni,)* or conventions of different trades *(gunna,)* depends on documentary evidence. There neither divine test nor witnesses are available."§

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* Cited in the *Veeramitrodaya*, *Vyavahár‌amayúc'ha*, *Vivádatandava*, *Smritichandricá*.

† Cited in the *Vivádatandava*, *Veeramitrodaya*.

‡ *Vrihaspati*, cited in the *Vivádatandava*, but *Cátyáyana* in the *Veeramitrodaya*, *Smritichandricá*, *Vyavahárachintámani*.

§ Ibid.

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12. "So also in a case relating to the right of a pathway or road, and in a case of a watercourse, possession affords the weightiest proof. There neither divine test nor witnesses are available."* In other cases, possession is proof.

13. "In cases relating to the payment or nonpayment of wages being between master and servant, to the nonpayment for an article purchased, or when a dispute arises concerning wagers laid at dice, or with sporting animals; in all these cases the evidence of witnesses must be resorted to, and recourse must not be had to a divine test or to writings."† In other cases, witnesses.

SECTION 2.

Of Relative Priority.

1. In answer to the question proposed, to which of the two acts will the greater weight attach, when each party adduces evidence undistinguishable in point of preference, the one asserting a prior, and the other a posterior claim? it is declared, "In all other matter, the latest act shall prevail."‡ The posterior act is of most effect in certain cases.

2. "In suits for property generally:" in actions for debt, &c. "The posterior act:" that which is last done, or the later transaction. The posterior act being established, he who asserts it succeeds; and even though the prior act should be established, the assertor on that ground loses his claim. Explanation.

3. Thus, if one party proves a loan by its delivery, and the other pleads that he owes nothing on account of repayment, here, in these two acts of delivery and repayment, both being established by evidence, the repayment is of the Example.

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* *Cátyáyana*, cited in the *Veeramitrodaya*, *Vyavahárachintámani*, and *Smritichandricá;* but *Vrihaspati* in the *Vivádatandava.*

† Ibid.

‡ *Yájnyawalcya*, cited in the *Vivádabhangárnava*, *Vivádárnavasetu*, and *Dáyatatwa*.

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greater weight, and the party who pleads the repayment obtains judgment.

Additional example.

4. So also, if a person having borrowed one hundred pieces of money at one per cent. should at a subsequent period agree to pay three per cent., and there being evidence to both engagements, that for three per cent. is of the greater weight; from its having occurred at a posterior date, and because, it would be inconsistent with the existence of the first. It has moreover been declared, "A posterior act not superseding a prior one, has no existence."

Exception in cases of mortgage, gift, and sale.

5. An exception to this rule has been propounded: "But in the case of a pledge, a gift, or a sale, the prior contract has the greatest force."* In the three instances of mortgage, &c., the prior act is the more valid: as if a person having mortgaged a piece of land to one person for a valuable consideration, should subsequently mortgage the same piece of land to another for a valuable consideration, the right will be with the first mortgagee, and not with the second. So also in the cases of gift and sale.

Objection answered.

6. It should not be contended, that as what has been mortgaged to one person cannot be mortgaged to another, on account of the right of the original owner having been divested, and that as the gift or sale of things already given and sold is impracticable, therefore this rule is impertinent; because it is here intended to declare the prior act to be more valid in cases where a person, through delusion or avarice, makes a second mortgage, &c. where he has no right to do so. This rule, therefore, being pertinent, should not be impugned.

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* *Yájnyawalcya*, cited in the *Vivádabhangárnava*, *Dáyatatwa*, *Vivádatandava*, but *Menu* in the *Vyavahárachintámani*.

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SECTION 3.

Of the Effect of Possession.

1. Previously to shewing how possession is evidence, when coupled with certain qualities, he declares another effect of possession. "He who sees his land possessed by a stranger for twenty years, or his personal estate for ten years, without asserting his own right, loses his property in them."* **Effect of possession.**

2. "*By another:*" by a stranger. "*Observes his land or moveable property enjoyed by another without interfering:*" does not prevent that other from enjoying it by a declaration that it is his own property: such twenty years enjoyment, that is to say, twenty years uninterrupted possession, will be the means of causing loss; and in the case of moveable property, such as elephants and horses, in ten years. **Explanation.**

3. But [it may be objected,] that this is inconsistent, as non-interruption cannot destroy proprietary right, non-interruption not having been recognized, either in practice or theory, like gift or sale, to cause a cessation of right, and that, therefore, proprietary right does not accrue from twenty years possession, and that possession, being merely evidence of right, cannot create the thing to be proved; and moreover, that it is not included among the causes of proprietary right, such as inheritance, &c. as detailed in the following text: "An owner is by inheritance, purchase, partition, seizure, or finding. Acceptance is, for a *Brahmin*, an additional mode; conquest for a *Cshetrya;* gain for a *Vaisya* or *Sudra.*"† These eight *Goutama* has declared to **Objection urged to this interpretation.**

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* *Yájnyawalcya*, cited in the *Vivádatandava, Smritichandricá, Vyavahάramayúc'ha, Smritisára, Vivádabhangárnava.*

† *Vivádatandava.*

be causes of right, but he has not enumerated possession. Therefore it is not right to affirm that twenty years possession is a mode of creating proprietary right; and as the causes of inferring right are facts of worldly concern, it is incorrect to infer them solely from a passage of scripture. This point will be amply discussed in the Chapter treating of Inheritance, but the text of *Goutama* is merely preceptive.*

Additional reasons for the objection.

4. Moreover, " He who enjoys without a title, even for many hundred years, the ruler of the earth should inflict on that sinner the punishment of a thief."† To assert, therefore, that simple possession confers a right of property, would be making an assertion contrary to this text: and it should not be contended, that this last text, " He who enjoys without a title," &c. relates to concealed possession, and the first, namely, " He who sees his land possessed by a stranger for twenty years," &c. (§ 1.) refers to open possession, because the text, " He who enjoys without title," &c. has been propounded in both without distinction. *Cátyáyana* has propounded the same rule: " In the possession of cattle, male or female slaves, &c. there is no validity either for the [unlawful] taker or his son. This is the established rule:"‡ and besides, loss cannot accrue from open possession, because it is not a cause of loss.

Argument continued.

5. It must not be supposed, that the exception in favour of the greater validity of a prior act with regard to mortgage, gift, and sale, is intended to imply the greater validity of

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* In other words, it merely enjoins the duties of the several tribes, and furnishes no proof that the modes of acquiring property are to be ascertained solely by reference to scriptural authority.

† *Náreda*, cited in the *Vivádatandava, Smritichandricá, Vyavahára-mayúc'ha.*

‡ *Vivádachandricá, Vivádatandava. Vyavahára-mayúc'ha.*

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the posterior act in a case of this description, provided that in this instance of landed property there have been twenty, and in that of personal property ten years possession, because in such acts (mortgages and the like), no subsequent transactions can really take effect. A person is entitled to mortgage, give, or sell his own property, but he has no proprietary right over things already mortgaged, given, or sold. A penalty is propounded for the gift and acceptance of a thing, where there is no ownership. "He who receives a thing which ought not to be given, and he who bestows it, both these are to be punished as thieves, and amerced in the highest penalty."* If this verse were intended as an exception to the general rule in the three cases of mortgages, &c., then the exception propounded in a subsequent text beginning, "Except property connected with pledges, boundaries," &c.† would be irrelevant. Hence it follows, that no loss can accrue on landed or other property.

Continuation of the argument. The text does not imply loss of remedy.

6. Nor is the remedy lost. By *Náreda*, a loss of remedy has been mentioned arising from privation (*abhava*) of cause of neglect, not from privation of the property. "The suit does not prosper after the expiration of the limited period, of a person practising indifference, and remaining silent."‡ So also has *Menu*: "If he be neither an idiot nor an infant under the full age of fifteen years, and if the chattel be adversely possessed in a place where he may see it, his property in it is extinct by law, and the adverse possessor

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* See §§ 13.

† *Vivádatandava*, *Veeramitrodaya*.

‡ *Náreda*, cited in the *Vivádatandava*, and in some copies of the *Mitacshara*.

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shall keep it."* The injury to the remedy is here intended, and not to the property. It happens when the possessor replies with this plea: "The plaintiff is neither an idiot, nor a boy, nor a minor. In his presence I enjoyed the property for twenty years without interruption. Had I unjustly got possession of the property, why did he remain passive all the time? To the truth of this assertion I have many witnesses." In this instance the plaintiff will be unable to rejoin, but the suit of one not able to rejoin may be proceeded on, as appears from the text, "The king shall investigate judicial proceedings in a *boná fide* manner, rejecting ambiguity," &c.† This is the correct interpretation.

Continuation of the argument.

7. It must not be supposed, that as neither the loss of the right nor of the remedy ensues, the text above quoted merely intends an injunction not to remain passive, as a person looking on and not interfering, might be in danger of losing his remedy; for had it been merely intended to convey an injunction against remaining passive, it would have been idle to define a period of twenty years, inasmuch as there is no reason to apprehend loss accruing on simple possession for any period within the memory of man. If it should be asserted, that the definite period of twenty years has been used to obviate any objection to the title deed of that time, according to the text of *Cátyáyana:* "He who by virtue of any title deed enjoys the property of a competent person for twenty years, the title deed is incontrovertible after that period:"‡ that also is denied, as the capacity

Other constructions pro-

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* *Menu*, 8, § 147, cited in the *Smritichandricá*, *Vivádatandava.*

† *Yájnyawalcya*, cited in the *Smritichandricá.*

‡ *Vyavaháramádhava*, *Vivádatandava.*

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of obviating objections to title deeds does not apply even to cases of mortgages, boundaries, and the like, and as such [general construction] would nullify the exception of such cases, as declared in the following texts of *Cátyáyana*:— "The ascertained enjoyment of a mortgage for twenty years in virtue of a title deed must be upheld, if such title deed is unexceptionable. After the decision of a boundary dispute, a document defining the boundaries must be granted. Any errors which that contains must be excepted to in the course of twenty years;"† and the same rule applies to ten years possession of personal property. posed and rejected.

8. The meaning of the text must therefore be declared in a different manner, which is now done. The loss of the profits accruing from the real and personal property is here intended, not the loss of the remedy or of the right; so that the meaning is, that although the rightful owner regains his field after twenty years uninterrupted possession by another, yet he loses the intermediate profits. This interpretation is conformable to the express words of the text, and is inferrible from the fault of the owner in remaining passive. Right interpretation of text propounded. Loss of profits intended.

9. But if the possession had been in his absence, he regains the profits also, as appears from the condition "*him who observes*;" and if the possession had fallen under his observation, but been contested, as appears from the condition "*without interfering*:" so also, if the possession had been observed and not contested, but the term of twenty years had not expired, as appears from the word "*twenty*." Possession must be for twenty years observed, and uninterrupted.

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* *Vyavahâramâdhava, Vivâdatandava.*

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Where the profits are forthcoming, they are to be restored.

10. It is true, that it may be considered improper to propound a loss of the accruing profits, because the right to them also exists; but this can only apply where the profits remain essentially *in statu quo:* as for instance, in the case of betel-nut and bread-fruit plantations, if the fruit be forthcoming as well as the trees which yielded it. But where, from the consumption of the produce, there is an essential destruction of the profits, there the right to it also is destroyed.*

Punishment may be inflicted on the unlawful possessor, even after twenty years.

11. "He who enjoys without right for many hundred years, the rulers of the earth should inflict on that sinner the punishment of a thief."† From this text it may be inferred, that, as is the case in cases of theft, the estimated amount of the property (unduly appropriated) should be restored, were it not for the rule declaring loss after twenty years, which is an exception to that text. But even after twenty years, punishment is to be inflicted from the possession being unlawful, and because there is no exception to this part of the text.

Recapitulation.

12. Hence it is established, that from the fault of the owner consisting in his neglect, and from the express words

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* This would seem to proceed on the apparently unjust principle of the civil law, which makes a distinction between the borrower for use, and the borrower for consumption, rendering the latter liable in a case where the former is not; by the rule that *obligatio extinguitur rei debitæ interitu."* But the Hindu legislator regards the ordinance rather as a rule of positive law, than as the dictate of unfettered equity; for he proceeds to state, that the estimated value should be restored were it not for the positive exception, which must be reconciled, so that it may not be superfluous.

† Vide *supra*, § 4.

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of the text, after the expiration of twenty years he cannot recover the produce consumed; and the same rule applies to personal property enjoyed for ten years.

13. An exception to this rule is now propounded: "Except property (connected with) pledges, boundaries, deposits, and of idiots and minors, and except deposits, and the property of kings, women, and learned students."* Exception.

14. "*A pledge*, and a *boundary*, and a *sealed deposit*." These being joined form the plural, pledges, boundaries, and sealed deposits. "*An idiot, and a minor*." These terms being compounded form the dual number, idiots and minors: the property of these two, the property of idiots and minors: pledges, boundaries, sealed deposits, and the property of idiots and minors, except these descriptions of property, that is, pledges, boundaries, deposits, and the property of idiots and minors.† A deposit is that which is committed to the care of another, with a description‡ of its quality or quantity, as has been declared by *Náreda*: "When a man bails any of his effects to another, in whom he has confidence, and from whom he has no doubt of receiving his pro- Explanation of the terms in the exception.

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* *Vivádatandava*, *Veeramitrodaya*.

† The disquisition here introduced is connected with grammatical principles, and the rules on which compounds are formed; but there seems to be no occasion for entering minutely into the subject in this place.

‡ This also is the reading of the *Veeramitrodaya*; but according to the *Subodhini*, the reading should be *Aprudurshanena*, "without a description;" as in the opinion of *Visweshwara*, where there is confidence, the precaution of counting and describing is needless. But the other reading of the text is most approved.

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perty again, it is a deposit, which the wise call *Nicshepa*: a deposit under seal is called *Upaniddhi*."

Neglect not productive of loss of profits in mortgage, &c.

15. In mortgages of land for twenty, and in pledges of personal property for ten years, no loss of profit accrues to one who observes the possession, and does not interfere, from the absence of any fault on the part of such person; because in these instances there is a competent reason for neglect, inasmuch as in the case of mortgage, the very purpose of its being made is to confer possession, and therefore the blame of neglect does not attach.

Nor in the case of boundaries, sealed and specified deposits.

16. In the case of boundaries, from their being easily ascertainable by ancient landmarks of chaff, ashes, or other articles, neglect may be permitted; and neglect may be allowed in the case of sealed and specified deposits, because there is a legal prohibition against the enjoyment of them, and if this prohibition be infringed, the profits must be restored with interest.

Nor in the case of idiots, and other exempted persons.

17. In the case of idiots and minors, neglect is excusable on account of their idiotism and minority, and in the case of a king, from the pressure of his multifarious occupations; in the case of women, from their ignorance and inexperience; and in the case of learned students, neglect is permitted from their being continually engaged in the duties of study and instruction, and learned disquisitions.

Recapitulation.

18. Hence it follows, that as in the case of pledges and the rest, as there is a method of accounting for neglect as to possession falling under observation, it can never be the cause of the loss of profits.

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* *Vyavahàramayùc'ha, Veeramitrodaya, Vivàdàrnavasetu.*

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SECTION 4.

Digression concerning Fines and other Penalties.

Penalty of usurpation in cases of pledge, and other instances.

1. He next propounds the particular penalties in pledges and other cases. "The king shall cause the usurper of pledges, &c. to restore the property to the rightful owner, and to pay a fine equivalent to the value of that property, or correspondent to his ability."* In the case of mortgages and the rest, down to the case of the property of learned students, he who by virtue of long possession usurps, should be made to restore the property to the rightful owner. This is merely a repetition of a former text, and the rule respecting the payment of a fine equivalent to the value of property usurped, is a positive injunction.

Cases in which the fine need not be equivalent to the property usurped.

2. Where, in the case of usurping lands, houses, &c. an equivalent fine may not be possible, reference must be made to the penalty hereafter propounded for a removal of landmarks and invasion of boundaries. If on account of the great wealth of the usurper, his arrogance would not be subdued by the payment of an equivalent fine, he must be amerced according to his ability. He must be made to pay so much as is sufficient to subdue his arrogance. "It has been declared, that a fine is levied for the purpose of correction, and by that the arrogant must be subdued." Hence it would appear, that the purpose of a fine is entirely penal. But where the offender has not property equivalent to that usurped, he must be amerced in such manner as may subject him to distress.

* *Yájnyawalcya*, cited in the *Vivádatandava*.

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Penalty to be inflicted on an offending pauper.

3. Where a person is an absolute pauper, corrections must be accomplished by means of reprimand, corporal punishment, &c. So says *Menu:* "First, let him punish by gentle admonition; afterwards, by harsh reproof; thirdly, by deprivation of property; after that, by corporal pain."*

Corporal punishment is ten-fold, and must not be inflicted on a Brahmin.

4. Corporal punishment, or that which is inflicted on the person, is declared to be ten-fold, and to apply to all but Brahmins, as *Menu* has declared: "*Menu,* son of the self-existent, has declared ten places of punishment for the three lower tribes, but the person of a Brahmin is inviolable. The parts of generation, the belly, the tongue, the two hands, and fifthly the two feet; the eye, the nose, both ears, the property, and (other parts of) the body."† It should be observed, that punishment is to be inflicted on the offending member.

Other modes of punishment.

5. The other methods are, an imposition of labour or a commitment to prison, as has been propounded by *Cátyáyana:* "A person proved to be a pauper should be compelled to work at his proper occupation, and if unable, should, with the exception of Brahmins, be committed to prison."‡

Special punishment for a delinquent Brahmin being a pauper.

6. A Brahmin, being destitute of property, should suffer dismission from office, &c. as *Goutama* has propounded: "Should he be a delinquent, the punishment of dismission from office, of reprimand, of banishment, and of branding,

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* *Menu,* 8, 129; but *Goutama,* cited in the *Vivádatandava.*

† *Menu,* 8, §§ 124 and 125, cited in the *Vivádatandava.*

‡ *Vivádatandava.*

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should be had recourse to."* So also *Náreda* has said: "Corporal punishment, deprivation of property, banishment, and branding, are the stated punishments. Mutilation is propounded as the punishment for capital offences. These are declared to be the general punishments."† Having premised this, he proceeds: "All these apply to a Brahmin, except the corporal punishment. A Brahmin must not be corporally punished."‡

7. The punishment of ignominious tonsure may be had recourse to, of banishment from the city, of setting a disgraceful mark on the forehead, and of exposing him on an ass. Additional modes of punishment.

8. Particular rules have been specified for branding. "For defilement of his spiritual teacher's bed, the mark of a *vulva*; for drinking spirituous liquors, the mark of a wine-flagon; for theft, the foot of a dog; for the murder of a Brahmin, the figure of a headless man."§ Manner of branding.

9. But the text of *Apastamba*, directing that a Brahmin should be deprived of vision, must be interpreted to signify, that at the time of banishment from the city, a cloth should be bound round his eyes, and not that his eyes should be extracted, because such an interpretation would be in contradiction to the text of *Menu* and *Goutama*: "But a Brahmin let him only banish."‖ The person of a Brahmin is inviolable."¶ It is needless to expatiate farther on this question. Construction of a text of *Apastamba*.

* *Vivádatandava.*

† Ibid.

‡ *Náreda*, cited in the *Vivádatandava.*

§ Ibid.

‖ *Menu*, 8, § 123.

¶ *Vyaváharamayúc'ha.*

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SECTION 5.

Of Possession without a Title.

A title is stronger evidence than mere recent possession.

1. Possession has been declared to be evidence of right, from its conformity with right. Should it be objected, that possession cannot afford evidence, because mere possession does not conform with right, [it is admitted in reply:] "A title is more powerful evidence than possession unaccompanied by hereditary succession."*

Simple possession is no evidence.

2. A title arises from gift, sale, or other cause of right. That is more powerful or more weighty evidence in the establishment of right, because possession is dependant on a title, as *Náreda* has said: "Possession with a clear title affords evidence; but possession constitutes no evidence, if unaccompanied by a clear title:"† nor is a title of right established from mere possession, because possession of another's property may be obtained by usurpation or other [unjustifiable] means. Hence it has been declared: "He who simply pleads possession, but no title, in consequence of adducing such false possession is to be considered as a thief."‡

Possession is evidence, when accompanied by five conditions.

3. But it is now declared, that possession is evidence when accompanied by the five following conditions,—a title, length of time, continuity, non-interruption, and the knowledge of the adverse party; according to the text, "Possession is fivefold,—titled, long, continuous, uninterrupted, and known to the adverse party."§

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* *Yájnyawalcya*, cited in the *Vivádatandava* and *Smritichandricá*.

† *Vivádatandava*, *Smritichandricá*.

‡ *Vivádatandava*.

§ *Vyása*, cited in the *Vivádatandava;* but *Pitámaha* in the *Smritichandricá*, and *Cátyáyana* in the *Dáyatatwa*.

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4. By propounding an exception in the case of possession accompanied by hereditary succession, it is demonstrated that possession, even independent of a title, may be evidence of right. The connection of the sentence is as follows: A title is weightier evidence than possession, provided that possession is unconfirmed by hereditary succession, that is, the consecutive enjoyment of three ancestors. That again is weightier than a title, because it is independent of a title. Also when accompanied by hereditary succession.

5. But it must be understood, that it is independent of the production of a title, and not independent of its existence, for its existence is inferrible from that possession. It affords presumption of a title.

6. The exception in favour of hereditary succession applies to a case beyond the memory of man, and the text showing the superiority of a title intends a case within the memory of man; because in cases falling within the memory of man, as it is practicable to produce a title, if such title is not produced, it is certainly inferrible that it never existed, and consequently, in such cases, the evidence of possession is dependant on the production of a title; but as from the non-production of a title in cases extending beyond the memory of man, it is impossible to be certain of its non-existence, possession accompanied by hereditary succession may be evidence in such cases, independent of the production of a title. A title is evidence in cases within the memory of man, but beyond such memory possession is sufficient.

7. This has been clearly laid down by *Cátyáyana:* "In cases falling within the memory of man, possession with a title is admitted as evidence of landed property. In cases extending beyond the memory of man, the hereditary Text of *Cátyáyana* cited in confirmation.

succession of three ancestors is admitted even without a title."*

One hundred years defined to be a period within the memory of man.

8. The period of one hundred years is defined to be within the memory of man, from the text, "The age of man extends to one hundred years."† "Even without a title:" that is to say, where there is no certainty of the non-existence of a title inferrible from its non-production. Therefore possession for upwards of one hundred years, hereditary, uninterrupted, and falling under the observation of the adverse party, confers a right, as it forms a presumption of, from its conformity with, a title.‡

Unauthorized possession even in the second and third generation punishable under certain conditions.

9. But in the case of a period extending even beyond the memory of man, possession is no evidence, if there be traditional proof of the absence of a title. On this is founded the rule, "He who enjoys without right, even for many hundred years, the ruler of the earth should inflict on that sinner the punishment of a thief."§ It must not be supposed from this text, "*He who enjoys*," &c. from the expression

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* *Vivádatandava* and *Smritichandricá*.

† *Vivádatandava*.

‡ Quia vero tempus memoriam excedens quasi infinitum est memoraliter; ideo ejus temporis silentium ad rei delicturæ conjecturam semper sufficere videbitur, nisi validissimæ sint in contrarium rationes. Bene autem notandum est a prodentioribus jurisconsultis non plane idem esse tempus memoriam excedens cum centenario quanquam sæpe hæc non longe abeunt, quia communis humanæ vitæ terminus sunt anni centum, quod spatium ferme solet ætatis hominum aut γενεὰς tres efficere; quas Antiocho Romani objiciebant, cum ostenderent repeti ab eo urbes quas ipse, pater, avus nonquam usurpassent.—Grotius, Lib. 2, Cap. iv, 7.

§ *Náreda*, cited in the *Vivádatandava* and *Smritichandricá*.

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of the singular number, and from the term "*even*," prefixed to the words "*for many hundred years,*" that punishment is to be awarded to the first person only who retains possession for a long time without a title, because this would imply that possession without title of the second or third occupant would be good evidence of right; but this is inadmissible, being contrary to the following text of *Náreda*: "For the first, gift is a cause; for an intermediate claimant, possession with a title,"* &c. Hence it follows that the text, "*He who enjoys,*" &c., must extend indiscriminately to all cases of unauthorized possession.

Possession by three ancestors not sufficient evidence without length of time.

10. The text, "That which is held even illegally without an apparent title, by three ancestors and the father, cannot be reclaimed, having been retained by three successive generations,"† must be interpreted to signify three successive ancestors, inclusive of the father: but the mention of three successive ancestors evidently alludes to time extending beyond the memory of man. Were it confined to the possession of three consecutive persons, then as the decease of three successive occupants might happen in one year, it would follow that the second year's possession without a title would afford evidence of right; but this would be contrary to the rule, "In cases falling within the memory of man, possession with a title is admitted as evidence of landed property," (§ 7.) But the text, "That which is held even illegally," &c. means, that if, in a case of illegal possession, the property cannot be reclaimed, it follows *a fortiori* that it cannot be reclaimed where

* Section 6, §§ 5.

† *Vivádatandava*, but *Náreda* in the *Smritichandricá* and *Dáyatatwa*.

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there is no certainty of illegality; and the text, "That which is immemorially held with a title by three ancestors, cannot be resumed from its having descended through three generations,"* must be interpreted to mean, with an immemorial, or without a demonstrable title, not without the existence of a title; for it has already been declared, that right does not accrue, even from centuries of occupancy, without the existence of a title. Such is the signification of the rule concerning the hereditary succession of three ancestors.

Possession with an inferrible tittle is evidence of right.

11. But [should the objection be urged,] that it is irrelevant to declare that in cases falling within the memory of man, possession accompanied by a title is evidence of right; for if the title may be derived from any extrinsic source of evidence, [such as purchase, &c.] then the right must be deducible from that alone, nor can possession be any evidence either of right or title; and if the title is to be inferred from any extrinsic source of evidence, how can possession accompanied by it [by title] afford evidence [of right]? It is replied, continuous possession accompanied by a title derived from other evidence, affords evidence of right at a subsequent period; but a title, such as purchase, &c. though established, unaccompanied by possession, is not evidence of right at a subsequent period, because, in the intermediate time, the right may have become extinct by gift, sale, or other means of transfer. All this is irrefragable.†

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* *Vivádatandava.*

† This seems to correspond with the civilians' notions of the definition of right.

"Some have founded the nature of dominion in the right or power of disposing of it: which is false; because minors, &c., cannot dispose

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SECTION 6.

Of a Title without Possession.

1. It has been shown that possession, when accompanied by a title, affords evidence of right; but lest it should be supposed that a title without possession affords equal proof, it is declared: "Where there is not the least possession, there a title is not weighty."* Such is the intent. With whatsoever title there is not the least occupancy, in that title there is no sufficient weight. **Title is not complete without possession.**

2. Gift consists in the relinquishment of one's own right, and the creation of the right of another; and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise. **Acceptance necessary.**

3. Acceptance is made by three means, mental, verbal, or corporeal. Mental acceptance is the determination to appropriate: verbal acceptance is the utterance of the expression. This is mine, or the like; which is a concrete cer- **Acceptance is three-fold.**

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of their estate, and yet in that estate are the proper owners or *domini*. *Non est argumentum, ideo aliquid tuum non esse, quia vendere non potes, quia consumere, quia mutare in deterius, aut melius.* Last of all, I could not describe it by possession alone; for possession is one thing, and property, or dominion, another. Possession is properly the legal attendant upon dominion. It is something like exerting the act of property, for by it we effectually exclude the seisin of others; and when we come to claim our own from the occupancy of those whom we conceive to detain or *possess* our property unlawfully, we mean to recover our right of exerting that act I mentioned. Moreover, dominion has its *foundation* only in natural or corporal possession."—*Taylor's Civil Law*, page 477.

* *Cátyáyana*, cited in the *Smritichandricá* and *Vivádatandava.*

tainty:* corporeal acceptance is manifold, as by touching. Special injunctions have been issued as to this mode of acceptance. "Let him give the skin of an antelope by holding its tail, a cow in the same manner, an elephant by his foreleg, a horse by his mane, and a slave girl by her head." *Aswalayuna* has also said, "Let him verbally address rational beings, and touch creatures not having the faculty of reason, and female slaves."†

Title to land incomplete without possession.

4. The acceptance of gold, cloths, &c. being completed by the ceremony of bestowing water, and falling, therefore, under either of the means, may be designated as a three-fold acceptance; but in the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession: otherwise the gift, sale, or other transfer is not complete. A title,

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* I am not sure that I have correctly rendered the terms "*suvikulpika prutyiya*," nor have I been able to obtain any information from the treatises which have hitherto appeared in the English language on the subject of Hindu Dialectics. In the *Bhásha-purichheda*, a treatise on logic of the highest celebrity in the *Nyáya* school, the definition is thus given, *nirvikulpikumprukarutade shoonium-sumbundhanuvugahe*, which may be rendered "abstract, divested of properties, unassociated with relations." *Suvikulpikum* is the opposite of this, "concrete," or "not abstract." In the instance given, the verbal declaration causes an association, or creates a relation between the receiver and the thing received.

† Uncertain, as cited in the *Vivádatandava*. *Let him verbally, &c.*] If the thing to be received be capable of motion and speech, then the receiver should verbally address it, saying, thou art mine; and the received should say, I am thine. But if the thing to be received be without intelligence, as a cow or the like, or a female slave, though a rational creature, the receiver should merely touch the present. —*Subodhini*

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therefore, without corporeal acceptance, consisting of the enjoyment of the produce, is weaker than a title accompanied by it, or with such corporeal acceptance.

Possession in some cases more weighty than a title.

5. But such is the case only, when of these two the priority is undistinguishable; but when it is ascertained which is first in point of date, and which posterior, then the simple prior title affords the stronger evidence; or the interpretation may be as follows: "Evidence is said to consist of documents, possession, and witnesses."* This having been premised as the general rule; the text, "A title is more powerful than possession unaccompanied by hereditary succession," and "Where there is not the least possession, there a title is not sufficient,"† have been propounded to point out to which the superiority belongs, where the three descriptions of evidence meet: as for instance, in the case of the first acquirer, if a title be proved by witnesses, it is of greater weight than possession unaccompanied by hereditary succession. Again, possession accompanied by hereditary succession, vested in the fourth descendant, is more weighty than a title proved by documents; but in the case of an intermediate [claimant], a title accompanied with even a small degree of possession is better than a title destitute of possession.‡ This has been expressly declared by *Náreda:* "For the first, gift is a cause; for an intermediate [claimant], possession with a title; but long and hereditary possession alone, is also a good cause."§

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* *Cátyáyana*, cited in the *Smritichandricá.*

† *Veeramitrodaya.*

‡ See Blackstone on this subject, Vol. ii, p. 197, note.

§ *Smritichandricá*, *Vivádatandava.*

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The first acquirer not shewing a title is punishable.

6. "*He who sees his lands possessed by a stranger,*" &c.* It has been declared, that to one who observes without interference his landed property enjoyed by another for upwards of twenty years, and his personal property for upwards of ten, there will be no restitution of the profits: but lest it should be supposed, that as there is no restitution of the profits, there will consequently be no award of penalty, the following text has been propounded, from which it is inferrible, that the extent of the penalty is to be adapted to the condition of the person and the nature of the evidence: "He by whom a title has been obtained, must produce it when he is impugned, but his son and his grandson need not; for them, possession is more weighty."†

But to avoid the penalty, his son need only prove uninterrupted, and his grandson hereditary succession.

7. By whatsoever person a title to landed or other property has been first acquired, that person, when his right to such landed or other property is disputed, must produce and prove his title by documentary evidence of gift or other mode of transfer. From this it is inferred, that a penalty attaches to the first acquirer failing to shew his title; but his son, the second incumbent, need not shew his title, but only continually uninterrupted and open possession. Hence it appears, that if he cannot prove a title, no penalty attaches to him; but penalty attaches to him, failing to show possession accompanied by the condition abovementioned. This is established; but his son again, the third incumbent, need not show either a title or possession accompanied by the abovementioned condition, but only hereditary succession. Hence it appears, that penalty attaches to the third incum-

* *Vide supra*, Sec. 3, § 1.

† *Yájnyawalcya*, cited in the *Smritichandricá* and *Vyavahára-mayúc'ha*.

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bent, failing to show hereditary succession, but not failing to show a title or possession accompanied by the above-mentioned condition.

8. Possession alone, then, is more weighty for the second and third; with this distinction, that it is strong in favour of the second, and stronger in favour of the third party. But here also the real meaning is, that although, in the case of all three, from the non-production of a title the property is equally lost, yet there is a difference as to the penalty. It has been declared also: "He by whom the title has been acquired is subject to penalty on failure of producing it, but not his son or his grandsons, though the possession of these two also is forfeited."*

The non-production of a title causes forfeiture to the son and grandson of the first acquirer, but penalty also to the first acquirer.

9. It has been held, that possession beyond the memory of man is good evidence of right, independently of the demonstration of a title. Here an exception to that rule is declared: "He who dies while a claim adduced by another is pending against him, his heir must produce it [the title.] Possession without a title is not in such case an adequate plea."† When an usurper, or other person having a claim made against him, departs this life while the claim is pending, before the final decision of the suit, his son, or other heir must prove his title.

The defendant dying, pending a claim against him, his son must prove his title, possession not being sufficient.

10. In such cases possession without the production of a title, though established by witnesses, does not afford evidence of right, because the plea of possession would not

Because the plea of possession would not have availed the original defendant.

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* *Harita*, cited in the *Vyavahâramayûc'ha.*

† *Yâjnyawalcya*, cited in the *Smritichandricâ* and *Vivâdatandava.*

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have been available in the original claim. It has also been declared by *Náreda:* " The cause of a litigant party dying *pendente lite* must be undertaken by his son. Possession will not decide the suit."‡ So that it is an established fact, if a litigant party die while the claim is pending, it is not thereby determined.

‡ *Yájnyawalcya,* cited in the *Vyavahāramayūc'ha,* but uncertain in the *Smritichandricá.*

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CHAPTER IV.

Of Appeals and other Matters.

SECTION 1.

1. Although a judicial proceeding may have been decided, it may in some instances be carried farther while the litigant parties are alive; but in others, the decision is final. Some cases appealable, others not.

2. With a view to elucidate this rule, the relative consequence of judicial tribunals; assemblies of townsmen [*puga*], and companies of traders [*Sreni*], is next propounded. "Persons specially appointed by the ruler: assemblies of townsmen: companies of traders, and families: these are classed according to their relative consequence, in the investigation of the affairs of men."* Relative rank of tribunals propounded.

3. "*Persons specially appointed by the ruler:*" those expressly nominated by the ruler or king to investigate judicial proceedings, such as are described in the following and other texts: "Persons who are versed in literature, should be appointed assessors of the court,"† &c. *Assemblies of* Exposition of the text.

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* *Veeramitrodaya* and *Smritisára.*

† *Vide supra*, Chap. i, Sec. 1, § 10.

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townsmen: of people of various tribes and various professions sitting in one place, as of villagers or citizens. *Companies of traders:* assemblages of persons of similar or various tribes exercising the same livelihood, as horse-dealers, pawnsellers, weavers, and shoemakers. *Families:* assemblages of cognate relatives, connexions, and kinsmen.

An appeal may be preferred from the decision of a family upwards to persons specially appointed by the ruler.

4. It must be understood, that of these four tribunals, "persons specially appointed by the ruler" and the rest, the first in the order of reading is the most considerable or important. "*Of men:*" of litigants. "*In the investigation of affairs:*" in the administration of justice. This is an established rule. A judicial proceeding having been decided by persons specially appointed by the ruler, if there be dissatisfaction on the part of the litigant fancying himself aggrieved, an appeal cannot be preferred from them to an assembly of townsmen: nor, having been decided by an assembly of townsmen, to a company of traders: nor, having been decided by a company of traders, to a family: but having been decided by a family, an appeal may be preferred to a company of traders, to an assembly of townsmen, and to persons specially appointed by the king.

An appeal may be preferred to the king. If affirmed, appellant to be amerced; if reversed, judicial authorities to be amerced.

5. It has been declared by *Náreda*, that after a case has been decided by persons specially appointed by the king, an appeal may be preferred to the king himself, in the following text: "Families: companies: assemblies: persons specially appointed: the king: these are the tribunals for judicial proceedings, and their relative consequence is in their consecutive order." A case on which a wager has been laid on the result, having been appealed to the king, and having been decided by him in council, and in presence

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of the authorities who tried the case, the unreasonable appellant must be amerced, if he is cast; but if he succeeds, the constituted judicial authorities must be amerced.

6. It has been stated, that after decision by the inferior tribunals, a case may be carried farther, and that the decrees of the superior courts are not appealable. Next is propounded an instance, in which the decrees of all authorities are liable to reversal: "He shall reverse cases decided by compulsion, by fear, by women, at night, in the inside of a house, abroad, and those brought forward by enemies."* He shall reverse cases decided or terminated by compulsion, or violence, by fear or terror; so also cases decided by women, at night, or in the night time, though not by females; in the inside of a house, or in the interior of a dwelling; abroad or outside of the town; and cases decided by enemies. Decisions liable to reversal.

7. Moreover, "A suit adduced by one intoxicated, or deranged, or diseased, or distressed, or a minor, or terrified, or uninterested, &c., is not valid."† "*Intoxicated*," with spirituous liquors. "*Deranged*:" disordered in any of the five modes by a prevalence of wind, or of bile, or of phlegm, or under a morbid state of the three humours, or under planetary influence. "*Diseased*:" by sickness. "*Distressed*:" distress engendered by the privation of ease and the acquisition of pain. "*A minor*:" one incompetent, through nonage, to the transaction of his affairs. "*Terrified*:" by enemies. "*Uninterested*:" from having no connexion with the What suits are invalid.

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* *Veeramitrodaya, Subodhini*, &c.

† Ibid.

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matter at issue. The use of the term "&c." signifies a suit adduced in opposition to usages,* of the town or the realm and the like. It has been established by those versed in judicial proceedings, that the suit of one will not be attended to, when it is in opposition to the usages of the town or realm, as appears from the text: "That act which is in opposition to the usages of a town or realm, and that act which has been prohibited by the ruling power, have no validity;† and this rule must also be understood relatively to the act of him who has no delegated or natural interest in the suit.

Certain suits improper between what parties.

8. But the text, "In a dispute between tutor and pupil, father and son, husband and wife, master and slave, a judicial proceeding cannot be entertained,"‡ is not intended to exclude them altogether from legal redress, because even between them judicial proceedings are allowable.

A pupil may have redress against his tutor in certain cases.

9. Moreover, "A pupil must be corrected without chastisement; but if this be impracticable, recourse must be had to slender rods composed of strings or cane, and the king will punish one using other instruments than these."§ This is a text of *Goutama*: "by no means on the head, as declared by *Menu*." From which rules it appears, that if a tutor, impelled by anger, strikes violently, or on the head; and if the pupil thus treated in an illegal manner, should

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* *Veeramitrodaya, Subodhini*, &c.

† Ibid.

‡ Ibid.

§ Ibid.

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represent his grievance to the king, a judicial proceeding will be entertained in this case.

10. "The ownership of father and son is the same in land which was acquired by his father,"* &c. From this text it appears, that in the case of land acquired by the grandfather, the ownership of father and son is equal: and therefore, if the father make away with the immoveable property so acquired by the grandfather, and if the son have recourse to a court of justice, a judicial proceeding will be entertained between the father and the son. **And a son against his father.**

11. "A husband is not liable to make good the property of his wife, taken by him in a famine, or for the performance of a duty, or during illness, or while under restraint." From this text it appears, that if, under other circumstances, the husband make away with his wife's property, and being required to refund, and having assets refuse to do so, then a judicial proceeding may be entertained between husband and wife. **And a wife against her husband.**

12. On the subject of a hired servant, the cases will be propounded in which judicial proceedings may be entertained between him and his master. "Whichever of these may rescue his master from imminent danger, shall be emancipated, and shall receive a son's share of the inheritance." From this text it appears, that there is no bar to the institution of a judicial proceeding by a slave against his master, refusing him emancipation and a share of the inheritance. **And a slave against his master.**

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* *Yájnyawalcya*, cited in the *Dáyabhaga*, *Dáyatatwa*, *Dáyacrama-sangraha*, *Vivádatandava*, *Vivádárnavasetu*, *Vivádabhangárnava*, &c.

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All such suits admissible, though not creditable.

13. The import of the text, therefore, "In a dispute between master and pupil," &c. is, that pupils and the like preferring an action, should be advised by the king in court, that such proceedings are not creditable, either really or apparently. But if the pupils or other similar suitors are inflexible, the case must be proceeded on according to the regular form.

Interpretation of a text of *Náreda*.

14. Notwithstanding the following text of *Náreda*, "The suit of one against many, of women, and of a servant, is to be rejected: this has been declared by high legal authorities," still a judicial proceeding of one with many on account of the same matter may be entertained, as appears from the following and other texts: "He who usurps the property of many, he who breaks an engagement formed [with many,]" and "him who has been assaulted by many," &c. The meaning must be, that a judicial proceeding cannot be entertained between one and many, on account of divers different matters at the same time.

Certain married women may sue.

15. Women* also who are independent, such as milk-women and wives of vintners, may institute judicial proceedings. The exception refers to respectable married women whose husbands are alive. From their coverture they cannot sue independently.

* A married woman carrying on trade openly for her own account distinct and separate from the traffic of her husband may, under the French institutions, bind herself by obligations relative to her trade without the sanction and authority of her husband, and subject herself to a personal decree.—*Colebrooke on Obligations and Contracts*, Part i, p. 233.

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16. The exclusion* of a servant from suing, has reference also to his dependant state, but is not intended to exclude him from instituting a judicial proceeding relative to his own peculiar interests by permission of his master. This is the proper construction. Servants may sue for their own rights.

* In the Hindu law, as in the Roman jurisprudence, a slave has in general no property exclusively his own, and his contracts are imperfect by reason of his dependance on the will and control of a master. But by his master's indulgence he may have separate and peculiar property, over which he has full power.—*Ibid.*

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CHAPTER V.

Digression concerning Trove and Plundered Property.

SECTION 1.

1. Cases which are liable to reversal having been treated of, next is propounded property liable to restoration. "Trove property is to be restored by the king to its owner: but if he fails to identify it, he is to be amerced with an equivalent penalty."* Trove property to be restored to the owner.

2. Gold or other property, having been lost by the owner and found by tax-gatherers, police officers, and such like people, and having been delivered to the king, is to be restored by the king to its rightful owner, if the owner identify it by marks of its quality and quantity; but if he fail to identify it, he is to be fined in an amount equivalent [to the value of the property claimed], from his having uttered a falsehood. Explanation of the text.

3. The rule for the restoration of trove property is here specially propounded, because finding has already been enu- Reason for declaring this rule.

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* *Veeramitrodaya.*

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merated among the causes of property, and therefore what is found is property.

Period for which trove property should be kept in deposit.

4. A period of limitation has also been declared: "Trove or waif property having been recovered by tax-gatherers or police officers, the rightful owner will recover within the period of one year: after the king will take it."* *Menu* has extended the period of limitation to three years in the following text. "Three years let the king detain the property of which no owner appears, *after a distinct proclamation:* the owner appearing within the three years may take it, but, after that term, the king may confiscate it."† Hence it would appear necessary to keep it in deposit for three years.

Deductions to be made after certain periods.

5. If the rightful owner appear within the year, he will recover the whole. If he appear after the expiration of the year, a sixth is to be deducted as a fee on the deposit, and the residue restored, as has been declared. "The king may take a sixth part of the property so detained by him, or a tenth, or a twelfth, remembering the duty of a good king."‡ Whence it is inferrible, that if the owner arrive within the year, the whole is to be restored. If in the second year, a twelfth; in the third, a tenth; and in the fourth and succeeding years, a sixth is to be deducted.

Reward to the finder.

6. The king is to give a fourth of his own share to the finder; but if the owner appear not at all, he is to give a

* *Veeramitrodaya.*

† *Menu*, 8, § 30.

‡ *Menu*, 8, § 33.

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fourth of the whole to the finder, and to take the rest, as has been declared by *Goutama:* "The king is to keep in deposit unclaimed trove property for a year; afterwards a fourth share of it goes to the finder, and to the king the rest."*

Period of limitation defined not to annul the owner's right, but to authorize the king to use the property.

7. The use of the word "*year*" here in the singular number is not intended to confine the period to one year, as is evident from the text, "Three years let the king detain the property," &c, (§ 4;) and the conclusion of the text, "after that term the king may confiscate it," (§ 4,) merely intends that, should the owner not appear within that period, the king is at liberty to use the property after the expiration of such period; but should the owner [subsequently] appear, the king, having deducted his own share, shall restore to him a sum equivalent [to the value of the property consumed].

Rules relative to stray cattle will subsequently be declared.

8. The rules above recited relate only to gold and similar valuables. But the rules relative to stray cattle will subsequently be propounded under the texts, "He shall give *panás* for an animal with uncloven hoofs," &c.

Law relative to hidden treasure.

9. Having thus declared the law relative to trove property, such as gold, &c. found lying on the high road or at toll and police stations, next is propounded the law relative to gold, &c. long buried in the earth, and usually called treasure. "But of a treasure anciently reposited under ground, *which any other subject, or* the king has discovered, the king may lay up half in his treasury, having given

* *Ratnácara*, &c.

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half to the Brahmins. A learned Brahmin, having found a treasure formerly hidden, may take it without any deduction, since he is the lord of all."* But if it be found by any other person, the king is to keep the whole, giving one sixth to the finder. But not having represented, and being known, the king shall cause him to relinquish the whole, and amerce him."†

Exposition of the preceding text.

10. The king having found treasure of the nature above described, and having given half of it to Brahmins, will keep the residue in his treasury; but if a learned Brahmin, that is, a priest versed in scriptural lore and of good conduct, find the treasure, he is to keep the whole, because he is the chief of the whole world: but if the treasure be found by any other than the king or a learned Brahmin, for instance, by an illiterate Brahmin, or by a man of the military tribe, the king, having given a sixth of it to the finder, will keep the residue, as *Vasishtha* has ordained: "Whoever finds property whose owner is unknown, the king will take it, giving to the finder a sixth;"‡ as *Goutama* has also declared: "Treasure found is the property of the king, excepting [that found by] a learned Brahmin. But any other than such Brahmin finding it, and representing the circumstance, will obtain a sixth."§ "*Anibedita,*" not having represented.

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* *Menu*, chap. 8, § 38 and 37, cited in the *Dáyatatwa*.

† *Menu*, cited in the *Dáyatatwa*, but not found in the Institutes.

‡ *Ratnácara*, *Smritichandricá*.

§ Ibid.

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The participle is here in an active signification,* not having represented, "*anibedita*," and having been discovered, "*vignyata*," forms the compound *anibeditavignyata*. Thus whoever has found treasure, and does not represent the circumstance, and is afterwards discovered by the king, is to be made to restore the whole, and to be amerced according to his circumstances.

11. In this case also, if the owner of the treasure appear, and identify his property by description of its quantity and quality, the king shall restore it to him, after having made deductions of a sixth or twelfth part. As *Menu* has declared: "From the man, who shall say with truth, 'This property which has been kept, belongs to me,' the king may take a sixth or twelfth part, for having secured it."† The amount of the deduction is to be regulated by the tribe of the claimant, and the period [expired]. Treasure to be restored to the owner after certain deductions.

12. Plundered property is next treated of. "The king must restore to his subjects property plundered from them; not restoring it, he incurs the sin of the person [from whom it was robbed]."‡ Having recovered from the robbers the The king must restore to his subjects property plundered from them.

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* "When क्त is affixed to *Dhatoos*, which mean knowing, serving, or desiring, or to those with an *Unubhundhu* ञि, the words formed thereby are active, passive, or containing, and are either in the present or past tense."—*Carey's Sanscrit Grammar*, p. 572. In the instance in the text, the participle is, properly speaking, in the passive form, but being derived from the *Dhatoo* ञिविद् to know, it may be used in an active signification, agreeably to the above rule.

† *Menu*, 8, § 35.

‡ *Ratnácara.*

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property robbed, it is to be restored to that subject, living within his realm, from whom it was taken; and not restoring it, the sin of the person robbed devolves upon him, and likewise the sin of that theft, as *Menu* has said: "To men of all classes, the king should restore their property which robbers have seized; since a king who takes it for himself, incurs the guilt of a robber."* Property seized by robbers must be restored by the king to men of all classes. The king consuming it himself, incurs the sin of robbery.

Neglect also culpable.

13. If having recovered it from the robber, he enjoys it himself, he incurs the sin of the person who seized the property; and if he is careless about the plundered property, he incurs the sin of his subject [from whom it was taken].

If plündered property be not recovered, its amount must be paid from the royal treasury.

14. If, having used every endeavour, he fail to recover the plundered property, he must refund the amount of it from his treasury; as *Goutama* has declared: "Having recovered property seized by robbers, he must restore it to its right place; or he must pay out of his treasury."† So also has *Crishna Dwaypayana* declared: "If unable to recover the plundered property, by the king so incapable, its amount must be restored out of his own treasury." Having thus propounded both the general and special introduction to

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* *Menu*, 8, § 40.

† Formerly there was a clause in the engagements of all landholders and farmers of land, by which they were bound to keep the peace, and in the event of any robbery being committed in their respective estates or farms, to produce both the robbers and the property plundered.

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judicial proceedings, debt on loans will next be treated of, as the first of the eighteen titles of law.*

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* The next Chapter treats of nonpayment of loans *(rinádanum)*, comprehending rates of interest, mortgages, &c., but as the introduction of it here would appear inappropriate, and not pertinent to the subject matter, and as it, with other subjects of litigation, has been amply discussed in Mr. Colebroóke's translation of *Juggunnátha's* Digest, I shall proceed at once to the Chapter on Testimony.

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CHAPTER VI.

Of Witnesses.

SECTION 1.

1. It has been declared, that evidence consists of written proof, possession, and witnesses. That of possession has already been defined. The nature of oral evidence is now to be declared. A witness may be either from seeing or hearing, as has been declared by *Menu:* "Evidence of what has been seen or of what has been heard is admissible." They are two-fold; a witness made, and a witness not made: a made witness is one nominated to give testimony: a witness not made is one not so nominated.

Witnesses may be by seeing or hearing, and may be either made or not made.

2. The made witness again is divided into five classes, and the witness not made into six, making in all eleven descriptions, as has been declared by *Náreda:* "Eleven descriptions of witnesses are recognized by the learned in law, five of which are made, and the remaining six are not made."* Their distinctions also have been declared by him: "A witness by record, by memory, by accident, by secrecy, and by corroboration."† These are the five classes of made witnesses: the nature of the witness by record and the rest has been defined by *Cátyáyana.*

Eleven classes of witnesses, five made and six not made.

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* *Vivádatandava.*

† *Vivádatandava* and *Smritichandricá.*

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Definition of made witnesses.

3. "One brought by the claimant himself, and whose name is inserted in the deed, is called a witness by record; a witness by memory is without record."* He also has given an explanation of the witness by memory without record: "The witness who for the purpose of greater publicity having witnessed a transaction has been repeatedly reminded of it by the claimant, is termed the witness by memory."† He who fortuitously arrives at the time of a transaction, and is cited as a witness, is termed a witness by accident. A distinction has been propounded by him between these two descriptions of witnesses, although they are both unrecorded: "Two witnesses for the substantiation of a claim are termed unrecorded, one intentionally brought, and one accidentally coming." "One who standing concealed, is caused to hear distinctly the defendant's words by the claimant, for the purpose of establishing his allegation, is termed a witness by secrecy."‡ "One who subsequently confirms the testimony of witnesses, whether his information be mediate or immediate, is termed a witness by corroboration."§

Definition of witnesses not made.

4. The six descriptions of witnesses not made have also been defined by *Náreda:* "A townsman, a judge, a king, one authorized to manage the affairs of the parties, one deputed by the claimant, and (in family disputes) persons of the same

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* *Vivádatandava.*

† Ibid.

‡ Ibid.

§ *Náreda*, cited in the *Vivádatandava.*

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family are also to be considered witnesses."* Here the term judge is intended to include the scribes and assessors, from this verse: "When a king investigates a suit, the witnesses are declared to be the scribes, judge, and assessors in succession."†

5. He next declares the qualifications and number of witnesses: "Religious, generous, of honourable family, speakers of truth, eminent in virtue, candid, having sons, wealthy, and in number three, are to be considered witnesses: conformers to revealed and written law, according to tribe and order, or all [in the cases of all]."‡ **Qualifications and number of witnesses.**

6. *Religious,*—addicted to piety. *Generous,*—habituated to making gifts. *Of honourable family,*—descended from a noble stock. *Speakers of truth,*—accustomed to veracity. *Eminent in virtue,*—not preferring their temporal interests. *Candid,*—not deceitful. *Having sons,*—possessed of male offspring. *Wealthy,*—possessing much gold and other property. *Conformers to revealed and written law,*—punctual in the performance of indispensable and enjoined ceremonies. Such persons being three in number, are to be considered witnesses. *Three,*—that is, a number not less than three; there cannot be less than three, but any excess above that number is optional. Such is the meaning. *According to tribe,*—that is, not differing in tribe; tribe, such as the *Moordhabushiktas* and the like, whether in the direct or inverse order. Thus *Moordhabushiktas* are **Explanation of the preceding text.**

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* *Vivádatandava, Smritichandricá.*

† Ibid.

‡ *Yájnyawalcya,* cited in the *Vyavahâramayûcha, Vivádatandava.*

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witnesses in the cases of *Moordhabushiktas;* so also in the cases of *Ambushthas* and others. This rule obtains also according to the order; that is, not different in order. *Order*, —the *Brahminical* order and the like. Thus *Brahmins* of the qualifications and number abovementioned are witnesses for *Brahmins*, and the same with *Cshetryas* and the rest. So also women should be made the witnesses of women, as *Menu* has said: "Women should regularly be witnesses for women."* But where they cannot all be procured of the same tribe or order, *Moordhabushiktas* and the rest, and *Brahmins* and the rest, may be made witnesses in the cases of each other.

Incompetent witnesses are of five descriptions.

7. In the absence of witnesses of the description above specified, for the sake of distinguishing others not positively prohibited, it is necessary to define those who are incompetent witnesses. They have been declared by *Náreda* to be of five descriptions: "By those skilled in the law, witnesses who are incompetent have been found to be of five kinds."†

Reasons of incompetency.

8. "By reason of interdict, of delinquency, of contradiction, of self-appointment, and of intervening decease."‡

Those who are incompetent by reason of interdict.

9. Those who are incapacitated by reason of interdict are next stated: "Learned students, religious devotees, superannuated persons, acetics, and the like, are those incapacitated by interdict; not from any other cause."§ Reli-

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* *Menu*, 8, § 68, cited in the *Vivádatandava.*

† *Vivádatandava* and *Smritichandricá.*

‡ Ibid.

§ Ibid.

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gious devotees are *Vanaprusthas.* By the term "and the like," is meant persons disobedient to their father, &c. as *Sancha* has said: "Persons disobedient to their fathers, residents in the families of their spiritual preceptors, ascetics, inhabitants of the forest, and devotees, are incompetent witnesses."*

10. Those who are incompetent by reason of delinquency are next treated of: "Thieves, public offenders, irascible persons, gamblers, cheats. These are incompetent from delinquency: there is no truth in them."† *Irascible persons,*—those subject to anger. *Gamblers,*—those who play with dice. By reason of delinquency.

11. The characteristic of witnesses incompetent from contradiction is next declared by him *(Náreda:)* "Of witnesses recorded and summoned by a litigant party, should one utter a contradiction, all are rendered incompetent by that contradiction."‡ By reason of contradiction.

12. The nature of witnesses incompetent by reason of self-appointment is next set forth. "He who not having been indicated, comes and offers his evidence, is technically called *Seoochee,* or spy. Such testimony is not available."§ By reason of self-appointment.

13. The description of witnesses incompetent by reason of intervening decease is next given: "How can any person By reason of intervening decease.

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* *Vivádatandava* and *Smritichandricá.*

† *Náreda,* cited in the *Smritichandricá.*

‡ *Cátyáyana,* cited in the *Vyavaháramayúc'ha, Smritichandricá.*

§ *Náreda,* cited in the *Smritichandricá.*

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give evidence touching a claim, the nature of it not having been communicated, and the claimant not being in existence? Such a person is an incompetent witness by reason of intervening decease."* The meaning is this: as to what claim or in whose behalf shall the witness depose, the plaintiff or defendant not being in existence, or being dead, the claim not having been preferred, and the nature of it not having been explained by the parties to the witnesses, and they not having been desired to bear witness in the matter? These, then, are incompetent witnesses by reason of intervening decease.

Exception in cases of evidence after claimant's decease.

14. But when sons or others are instructed by a father or other person at the point of death, or even in health, to give evidence in a certain matter, they may be witnesses after decease, as *Náreda* has said: "After the death of the claimant, except those instructed by him on the point of death."† Also, "A witness may give evidence in a matter touching the six species of bailments [the claimant being dead], a just claim having been communicated by one not of unsound mind."‡

Other incompetent witnesses enumerated.

15. Other incompetent witnesses have also been enumerated: "A woman, a minor, an old man, a gamester, an intoxicated person, a madman, an infamous person, an actor, an infidel, a forger, one deformed, degraded from caste, a friend, one interested in the subject-matter, a partner, an

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* *Náreda*, cited in the *Smritichandricá.*

† Ibid.

‡ Ibid.

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enemy, a robber, a public offender, one convicted, an outcaste and others, are incompetent witnesses."*

16. *A woman*,—a term of obvious import. *A minor*,—one who has not attained years of discretion. *An old man*,—one whose age exceeds eighty years. By the term *old*, learned students, and those excepted in other texts are indicated. *A gamester*,—one who plays with dice. *An intoxicated person*,—with liquors and the like. *A madman*,—one under planetary influence. *An infamous person*,—accused of the murder of priests or other similar offences.† *An actor*,—a dancer. *An infidel*,—an atheist or the like. *A forger*,—one who fabricates documents. *One deformed*,—destitute of an ear or other organ. *Degraded from caste*,—a slayer of a Brahmin or other similar criminal. *A friend*,—an intimate. *One interested in the subject-matter*,—having an interest in the point contested. *A partner*,—one engaged in the same business. *An enemy*,—a foe. *A robber*,—a thief. *A public offender*,—one relying on his own violence. *One convicted*,—one whose falsehood has been proved. *An outcaste*,—one deserted by his relatives. **Explanation of the terms of incompetency.**

17. By the term "and others" is indicated those incompetent witnesses who are pointed out in others texts also. Incompetent witnesses, by reason of delinquency; incompetent by reason of contradiction, and by reason of self-appointment and intervenient decease. These, and women, **The text includes other incompetent witnesses formerly prohibited.**

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* *Yájnyawalcya*, cited in the *Vyavahάramayúc'ha.*

† *Náreda*, cited in the *Virádatandava;* but *Yájnyawalcya* in the *Vyavahάramayúc'ha.*

children, and the rest, are incompetent witnesses. Witnesses are to be three in number, but to this rule he propounds an exception.

Exception as to the number of witnesses.

18. "By consent of both parties, even one person of virtuous knowledge may be a witness:" a person of virtuous knowledge signifies, one who, by means of knowledge, performs all the indispensable and enjoined ceremonies; even one such person may be a witness, by the acquiescence of both parties. By virtue of the term *even*, the number two is also included. "*Conformers to revealed and written law.*" By this rule, although it would appear that virtuous knowledge is equally an attribute of three, yet the meaning is, that their evidence is admissible without the consent of the parties, but that the evidence of one or two is not admissible without the consent of the parties; therefore the mention of three is relevant.

Exception as to the qualifications of witnesses.

19. An exception is next propounded to the text "*religious, generous,*" &c. "Every man may be a witness in cases of abduction, robbery, assault and abuse, and a flagrant offence."* The definition of abduction, &c. will subsequently be given. In such cases, all those who are prohibited in texts as destitute of piety and other qualities may be witnesses. But even here, those cannot be witnesses who are incompetent by reason of delinquency, or of contradiction, or of self-appointment; because the reason of incompetency, that is, there being no truth in them, exists here also.

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* *Yájnyawalcya*, cited in the *Vyavahâramayúc'ha*, but uncertain in the *Vivádatandava*.

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20. Although from this text it appears, that adultery, theft, and assault and abuse, rank with flagrant offences, yet as these are committed openly by persons relying on their own violence, separate mention has been made of adultery and the rest, which rather signify offences committed privately. Homicide, robbery, forcible abduction of other men's wives, and assault and abuse, are the four descriptions of flagrant offences.* Definition of offences.

21. Next is propounded the deposition of witnesses. "The witnesses should be made to depose, having been placed near to the plaintiff and defendant:"† brought close to the plaintiff and defendant. It appears, from a rule laid down by *Goutama,* that they need not speak when questioned apart. They shall be made to depose in the manner hereafter mentioned. Here *Cátyáyana* has propounded a distinction. "The judge, being in the assembly, should calmly interrogate the witnesses, placed near to the plaintiff and defendant. He will inquire their testimony (except in the case of Brahmins) in the presence of the gods and priests."‡ In the forenoon, let the judge, being purified, having severally called on the witnesses, being purified also, whose faces are turned either to the north or to the east, interrogate, by the solemnity of repeated adjurations, all being acquainted with the rules of duty and circumstances of the case."§ Mode of taking depositions.

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* *Vivádatandava.*

† *Yájnyawalcya,* cited in the *Vivádatandava.*

‡ *Vivádatandava, Vyavahâramayúc'ha,* and *Smritichandricá.*

§ *Náreda,* cited in the above authorities.

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Mode of adjuring several orders.

22. *Menu* has propounded a rule to be observed in taking the depositions of *Brahmins and others.** "Let the judge cause a priest to swear by his veracity; a soldier by his horse or elephant, and his weapons; a merchant by his kine, grain, and gold; a mechanic or servile man by *imprecating on his own head, if he speak falsely,* all possible crimes."† The meaning is, he shall adjure a *Brahmin* by saying, If you speak falsely, your truth will be destroyed: a *Cshetrya* by saying, Your horse or elephant and weapons will become useless: a *Vaisya,* Your cattle, seeds, and gold will be unproductive: a *Sudra,* he shall adjure by saying, If you speak falsely, all sins will be on your head.

Exception in case of certain *Brahmins, Cshetryas,* and *Vaisyas.*

23. "Regenerate men who tend herds of cattle, who trade, who practise mechanical arts, who profess dancing and singing, who are hired servants or usurers, let the judge exhort, and examine as if they were *Sudras.*"‡ The term regenerate men has been used to denote, that those of the military and commercial classes are likewise included in the above text. The term "*who profess singing,*" means vocal performers.

Case of witnesses being challenged.

24. If the defendant take exception to witnesses, and it be susceptible of visible proof, as in cases of minority, the ex-

* *Menu,* 8, § 102, cited in the *Vivádatandava, Smritichandricá,* and *Vyavahâramayúc'ha.*

† *Menu,* 8, § 113, cited in the *Vivádatandava, Vyavahâramayúc'ha,* but *Náreda* in the *Smritichandricá.* "Sometimes they swore by anything they made use of, as a fisher by his nets, a soldier by his spear, &c."—*Potter's Antiquities of Greece,* Vol. i, page 293.

‡ *Vivádatandava* and *Smritichandricá.*

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ception must be tried by that; but in cases not susceptible of visible proof, it rests on his (the defendant's) assertion, and on popular report, but not on other witnesses, so that there may be no infiniteness.

25. If a defendant, having taken exception to witnesses, cannot establish it, he is to be amerced according to his ability; but if he prove it, the witnesses become incompetent, as has been said: "A person failing to establish an exception openly made against witnesses, should be punished: but if proved, the witnesses are to be dismissed, and deprived of the privilege of testimony."* A false challenge punishable.

26. Exceptions having been proved against all the witnesses adduced by the claimant, should he be destitute of other means of proof, he will be defeated; from the text, "Should the claimant, relying solely on the veracity of his witness, be defeated, he shall be caused to pay a fine:" and the meaning is, that should he not be destitute [of other means of proof], he may have recourse to additional evidence. Witnesses being found incompetent, recourse may be had to other means of proof.

27. In reply to the question, How is the adjuration to be urged? it is stated, "Those places assigned to offenders and to heinous sinners, and those places assigned to house-burners, and those assigned to the murderers of women and children: he will obtain all those places (of punishment) who Form of adjuration to be used towards the servile class, and to the regenerate orders following mean occupations.

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* *Veeramitrodaya.*

† *Náreda,* cited in the *Vivádatandava;* but *Cátyáyana* in the *Smritichandricá.*

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gives false evidence. All the virtues performed by you in hundreds of other worlds will accrue to him whom by your falsehood you have injured." The meaning is, that the admonition is to be as follows. Those places assigned to persons who have committed heinous and grievous sins, to house-burners, and to the murderers of women and children, he will attain who gives false evidence. Moreover, all the virtue practised by you in hundreds of other worlds will accrue to him who has been defeated by means of your falsehood. This must be understood as relating to the servile class, as appears from the words of the text: "But a servile man by all possible crimes." It must be understood also as relating to regenerate men, exercising the business of herdsmen, &c. as appears from the text: "Regenerate men who tend herd of cattle," &c.

The adjuration not to be understood literally.

28. As it is preposterous to suppose the loss of all the virtues practised in many other worlds, and the acquisition of the fruits of grievous offences committed by another, merely from the utterance of a falsehood, it follows that this is declared solely for the purpose of creating awe in the witnesses; as *Náreda* has said: "By ancient virtuous texts, and by extolling the pre-eminence of truth, and by denouncing falsehood, he will repeatedly inspire them with awe."*

Penalty for refusal to give evidence after admonition.

29. In answer to the question as to the mode of proceeding when the witnesses, having been admonished, remain mute, "A man not giving evidence will be made to pay the whole debt by the king, together with ten per cent. [on

* *Vivádatandava.*

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the amount], after forty-six days."* He who having agreed to give evidence, and having been admonished, remains entirely mute, must be caused by the king to pay to the creditor the whole debt with interest, together with a tenth share over and above the debt. This tenth share will belong to the king, as appears from the text: "The debtor must be made by the king to pay a tenth share, over and above the debt proved;"† and this rule must be understood to operate after the expiration of forty-six days. He will not be made to pay it during the interval. It must also be understood as implying the absence of sickness and other calamity, as has been declared by *Menu:* "A man who is unafflicted, who comes not to give evidence, in loans and the like, within three fortnights *after due summons*, shall take upon himself the whole debt, and pay a tenth part of it as a fine *to the king*."‡ The term unafflicted, signifies one free from any calamity (inflicted) by God or the king.§

Penalty for refusing to bear testimony.

30. Next is stated the case of a person who, though acquainted (with the nature of the affair,) maliciously refuses to accept the office of witness. "That mean person who, though acquainted, does not give evidence, is equal in point of sin and of punishment to false witnesses."|| That mean person

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* *Yájnyawalcya*, cited in the *Vivádatandava*, *Smritichandricá*, and *Vyavahàramayúc'ha.*

† *Veeramitrodaya*, *Retnácara.*

‡ *Menu*, 8, § 107, cited in the *Vivádatandava*, *Smritichandricá.*

§ I have here been compelled to differ from the translation of Sir William Jones, see *Menu*, 8, § 107. He has rendered the term *aguda*, "one who labours not under illness;" but this, from the subsequent interpretation, is evidently not sufficiently comprehensive.

|| *Yájnyawalcya*, cited in the above authorities.

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who, though fully conversant with the matter in dispute, does not give evidence, or refuses (to become a witness,) is equal in point of sin and of punishment to false witnesses. The punishment of false witnesses will subsequently be propounded.

False evidence being detected, the judgment is to be reversed.

31. Having punished the false witnesses, the case must be re-examined; and if the suit be concluded, and false evidence be subsequently detected, the case must be commenced upon *de novo*, as *Menu* has declared: "Whenever false evidence has been given in any suit, the king must reverse the judgment; and whatever has been done, must be considered as undone."*

Mode of proceeding when the evidence is contradictory.

32. Next is propounded the rule in a case where the testimony varies. "In a contradiction, the assertion of the majority; where the numbers are equal, that of the respectable party; where there is contradiction among respectable witnesses, that of the most respectable."† In a case of contradiction or variation, the assertion of the majority must be received. But in a case of contradiction where the numbers are equal, the assertion of the respectable party must be received as evidence; but where there is a variation among respectable persons, the assertion of those who are most respectable must be received, that is, of those who are endued with a knowledge of revealed law, who shape their conduct accordingly, who have children, wealth, and virtuous qualities.

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* *Menu*, 8, § 117, cited in the *Vivádatandava* and *Smritichandricá*.

† *Yájnyawalcya*, cited in the *Smritichandricá* and *Vyavahára-mayúc'ha*.

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33. Where respectable witnesses are few, and others are many, there also the assertion of the respectable party is to be received. This is inferrible from the text: "By consent of both parties, even one person of virtuous knowledge may be a witness;"* which demonstrates the great superiority of good qualities.

Superior respectability prevails over superior numbers.

34. But the former text, "Of witnesses recorded and summoned by a litigant party, should one utter a contradiction, all are rendered incompetent by that contradiction," relates to a case where there is no distinction to be made [among the witnesses] by reason of their being all equal.

Application of a former text.

35. Next is propounded on what depositions of the witnesses, success, and on what defeat, depends. "He will be successful whose witnesses depose to the truth of his statement. But the defeat will certainly be his whose witnesses depose contrariwise."† That party will be successful whose witnesses depose to the truth of his statement, describing the subject-matter, its quality and quantity, and saying, We know this to be true. But that party whose witnesses depose contrariwise, in opposition to his statement; saying, We know this to be false, his will certainly or assuredly be the defeat.

The decision rests on the evidence of the witnesses adduced.

36. But where from a want of recollection of the subject of the claim, the witnesses do not depose either affirmatively or negatively, there the decision must depend on other evi-

Except where the witnesses do not recollect.

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* Vide *supra*, § 10.

† *Vivádatandava* and *Smritichandricá*.

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dence; witnesses should not be repeatedly questioned by the king. That assertion which is unpremeditated should be received; as has been declared: "That assertion which is unpremeditated and blameless should be received; and having been made, the witnesses should not be perpetually questioned by the king."*

Where a claimant's witnesses depose against his claim, he may adduce others to confute their evidence.

37. An exception is next propounded to the rule: "But the defeat will certainly be his whose witnesses depose contrariwise (§ 35)." "Evidence having even been given by witnesses, if others who are more respectable, or double in point of number, contradict them, the first deponents will become falsified."† Evidence having been given by witnesses of the first-mentioned description, designedly contrary to the subject-matter of the claim, if others who are more respectable than the former, or double in point of number, contradict them, and depose conformably to the claim, then the former witnesses become falsified or perjured.

Objection replied to.

38. It may be objected, that this is not consistent; because by going into other proof, after depositions made by witnesses agreed to for the establishing the truth by the parties, the assessors, and the chief of the assembly, there would be the danger of infiniteness, and because it opposes the following text of *Náreda:* "But after the suit is decided, evidence is fruitless, whether written or oral, if not in the first instance declared: as the efficacy of rain becomes useless after the crops are ripe, so evidence in decided cases is

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* *Náreda*, cited in the *Vivádatandava.*

† *Yájnyawalcya*, cited in the *Vivádatandava* and *Smritichandricá.*

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equally unprofitable."* To this objection it is replied; If a claimant, in the course of the investigation, not relying upon as evidence the testimony of those witnesses with whose faults he was not cognizant, from their being on his own side, should, from their testimony being adverse to his claim, take exception to such witnesses, what is there to prevent recourse being had to other proof?

Credibility must be enquired into, after the question of competency has been disposed of.

39. "Of him whose organ is defective, and where there is a fallacy, that is not true knowledge." In the same manner, as in the case of an eye or other organ, though its defect may not have been proved, yet by reason of there being no certain evidence of the knowledge created by it, from its placing the object in a false light, defect may be inferred. The same reasoning applies here. Moreover, a scrutiny into the testimony of witnesses, as well as a scrutiny into [the character of] the witnesses, has been propounded: "Let him [the king], together with his assessors, scrutinize the testimony of witnesses." It has also been propounded by *Cátyáyana:* "When the means of proof have been strictly examined, then the testimony must be scrutinized, and he who has been tried by a scrutiny into his testimony is termed scrutinized as to the subject-matter."† This is the rule. The term *kriya*, or proof, signifies the witnesses. When these have been examined by the rule, "A friend, one interested in the subject-matter," &c. then their testimony must be scrutinized, and the scrutiny into the testimony is for the purpose of establishing the truth of the matter alleged, as

* *Vivádatandava.*

† Ibid.

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appears from the text: "Allegations are established by truth." When the proof has been thus scrutinized, and by the scrutiny also of testimony the subject-matter alleged has been scrutinized, he (the witness) is termed scrutinized in such case. This is the rule, or the established practice of those acquainted with judicial matters. [So likewise] where there is no defect of organ, preventive of knowledge, the object appears in its true light.

Another objection replied to.

40. Should it be objected, that the claimant cannot have recourse to other means of proof passing over the proof adduced by himself, it is answered, that this is no objection. "Having departed from strong evidence, he who relies on weak evidence cannot recur to the former means of proof, after the decision has been given against him."* Form this text of *Cátyáyana*, prohibiting recourse to other means of proof after judgment, it is indicated, that recourse may be had to other means of proof prior to judgment; also from the following text of *Náreda*: "But after the suit is decided, evidence is fruitless;" by which it appears, that recourse to other evidence is forbidden only at a time subsequent to the judgment, and not before also. Therefore, evidence having been given by witnesses, recourse may be had to other means of proof by one not content. This is the rule.

What further means of proof may be resorted to, by a claimant not content with his evidence.

41. This being the rule, if persons originally indicated, but not then at hand, more respectable than or double the number of those whose evidence has been taken, be forthcoming, the proof must be made to depend

* *Paricshatatwa*, &c.

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on those witnesses; this appears from the text of *Náreda:* "But after the suit is decided, evidence is fruitless, whether written or oral, if not in the first instance declared." In default of those originally indicated, witnesses not indicated should be resorted to, not a divine test; from the text, "A wise man will reject the evidence of a divine test, if witnesses are procurable:" but if witnesses are not procurable, recourse must be had to divine test, and after this stage no other means of proof can be sought for by a non-content claimant, because there is no rule to that effect. Therefore the proceeding must be here finally determined.

A defendant not being content with his evidence, cannot resort to other means of proof.

42. But where a defendant takes exception to his witnesses, being not content with the testimony given by them, as operating adversely to his interests; in such a case, as the liberty of adducing other means of proof has not been extended to a defendant, the purgation of the witnesses must be affected by a delay of seven days for the appearance of calamity *inflicted* by God or the king. And if the exception be established, the witnesses are to be made to pay the debt which was the subject of the action, and are to be amerced according to their abilities. But if the exception be not established, the defendant must rest content.

Text of *Menu* cited.

43. As *Menu* has declared: "The witness who has given evidence, and to whom, within seven days after, *a misfortune* happens *from* disease, fire, or the death of a kinsman,* shall be condemned to pay the debt and a fine." This rule respecting the case of a non-content defendant must be un-

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* *Menu*, 8, § 108.

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derstood as being an exception to the general rule, "He will be successful whose witnesses depose to the truth of his statement," &c.

Erroneous construction noticed and refuted.

44. Some have interpreted the rule, "Evidence having even been given by witnesses," &c. to signify, that the witnesses adduced by the claimant having deposed in favour of the claim, if the defendant produce other witnesses more respectable, or double in point of number, to depose contrariwise, then the witnesses of the original claimant will become falsified. But this is erroneous, because the production of evidence on the part of the defendant is [in the first instance] inadmissible. He is called the claimant who affirms the matter to be proved. His adversary, who denies it, is termed the defendant. Moreover, the* proof of a negative is dependant on the establishment of an affirmative, and the establishment of an affirmative is not dependant on the proof of a negative. Therefore the proof of the affirmative only is proper, the nature of a negative not admitting of its being established by witnesses or other evidence; and it is consequently right, therefore, that the claimant only should adduce proof. Moreover, the mode of proceeding is invariably propounded with reference to the nature of the reply, according to the following texts: "When a special plea and former judgment are pleaded, the defendant shall adduce the proof; in a total denial, the plaintiff. In a confession

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* "The sixth general rule is: In every issue the affirmative is to be proved. A negative cannot regularly be proved, and, therefore, it is sufficient to deny what is affirmed until it be proved; but when the affirmative is proved, the other side may contest it with opposite proofs." —*Introduction to Morgan's Essay on the Law of Evidence*, p. 39.

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there is no issue." In one suit, the proof cannot rest on both parties. Therefore the construction, that " if the defendant produce other witnesses more respectable, or double in point of number, to depose contrariwise," &c. is inadmissible.

45. But the opinion [is not correct], that this has been propounded with reference to the following text, "In the case of two claimants in the same matter, both having witnesses, the witnesses of the first claimant must be received;" that is to say, the witnesses of him who made the first representation are to be received; that this rule indicates whose witnesses should be received in the case of two affirmative claimants to the same property, by right of inheritance, without any ascertainable priority or posteriority as to the time of the acquisition, and that the rule, " Evidence having even been given," &c. is an exception to it; that thus the witnesses of prior and posterior claimants being equal in point of number and quality, the witnesses of the prior claimant must be interrogated; but that his adversary's witnesses are to be interrogated where the witnesses of the posterior claimant are greater in point of respectability or double in point of number; that there is not proof of a negative, as both parties assert an affirmative;* and the case being unconnected with the four descriptions of answer, the settled rules of pleading do not apply to the example cited; and, that it is equally allowable to assign two means of proof to both parties, as two means of proof to one party in the same cause. In all this reasoning the holy preceptor does not

Another construction refuted.

* " For this is not properly the proof of a negative, but the proof of some position totally inconsistent with what is affirmed."—*Ibid.*

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acquiesce, as it is not inferrible from the use of the term "*even,*" nor from the context, nor from the subject-matter. Further discussion is needless.

Penalty of suborners and false witnesses.

46. False witnesses have already been treated of: their punishment is next declared. "Suborners, and witnesses guilty of falsehood, should be severally punished in a penalty double that of the suit; and a Brahmin should be banished."* He who by means of a gift of money or otherwise, induces witnesses to depose falsely, is a suborner: he, and they, who falsely depose accordingly, are to be severally or individually punished in a penalty double that of the suit, that is to say, in a penalty double that which is awarded on the loss of the suit respectively, and a Brahmin is to be banished, that is to say, expelled from the country, but not [otherwise] punished.

Special rules in certain cases.

47. This must be understood as having special relation to a case, where the operation of avarice or other passion has not been ascertained, and not habitual. *Menu* has declared the punishment, when the motive of avarice or other passion has been ascertained, and habitual: "If he speak falsely through covetousness, he shall be fined a thousand *panás;* if through distraction of mind, *two hundred and fifty,* or the lowest amercement; if through terror, two mean amercements; if through friendship, four times the lowest; if through lust, ten times the lowest amercement; if through wrath, three times the next, *or middlemost;* if through ignorance, two hundred complete; if through inattention, a hundred only.†

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* *Yájnyawalcya,* cited in the *Vivádatandava* and *Smritichandricá.*

† *Menu,* 8, §§ 120, 121, cited in the above authorities.

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48. *Covetousness*, cupidity; *distraction of mind*, perturbed state of the intellect; *terror*, fear; *friendship*, excessive partiality; *lust*, extreme desire of female enjoyment; *wrath*, anger; *ignorance*, defective knowledge; *inattention*, indifference as to information. By the numerals *one thousand*, &c. is always to be understood *panás*, or copper pice.

Explanation of the terms in the texts of *Menu.*

49. A just king will punish the three inferior tribes giving false evidence, having amerced them; but he will banish a Brahmin. This relates to a case of repetition, as is denoted by the use of the present participle *(koorvan)*. Having amerced the tribes, *Cshetryas* and the rest, with the fines above specified, he will punish them by stripes, &c. because the term *prubas*, in the ordinary acceptation, signifies corporal punishment, and the subject has relation to the ethical code. Corporal punishment includes cutting off the lips, amputation of the tongue, and deprivation of life; and this must be understood as being proper to be inflicted with reference to the nature of the false evidence.

Punishment of the three inferior tribes for repeated perjury.

50. But having amerced a Brahmin, he will banish him: that is to say, he will expel him from the country, or denude him, as the meaning of the term *bibasyet* may signify the stripping off the clothes. By giving the causal affix, the penultimate syllable is rejected, as in the case of a derivative formed from a crude noun with the affix *ishtha.** Moreover, the term *vasa*, residence, signifies a house, or place of habitation; and the term *bibasyet* may therefore

Punishment of the priestly tribe for the same offence.

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* An explanation of this sentence would involve a grammatical disquisition of some length. It displays an ingenious effort to save the Brahminical tribe, if not *totidem verbis*, at least *totidem literis.*

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mean, that he should unhouse him. The award of the fine for each description of motive must be given against a Brahmin with special reference to its being avarice or other motive, and in a case of non-repetition; but in a case of repetition, a pecuniary fine and banishment also; and here also with relation to the tribe, the subject-matter, and the quality [of the parties], &c. the term *bibasum* must be interpreted as signifying denudation, destruction of dwelling, or banishment from the country. In a case of false evidence, where there is no proof of avarice or other motive, where there has been no repetition of the offence, and where the subject-matter is inconsiderable, a pecuniary fine must be awarded against a Brahmin similar to that prescribed for the military and other tribes; but where the subject-matter is considerable, expulsion from the country also; and the text of *Menu* is applicable to the case of all [the tribes], where [the perjury] is habitual.

Brahmin may be fined, but on no account corporally punished.

51. It should not be urged, that a Brahmin is exempted from a pecuniary fine, because it would follow, (as corporal punishment is prohibited,) that in the case of a trivial fault, it would be requisite to punish him by denudation, destruction of dwelling, branding, or expulsion, or else (as the only alternative) to exempt him from punishment altogether. It also appears *justifiable* from the texts: "To the four tribes, not performing expiation, he should adjudge the lawful penalty, corporal and pecuniary."* "A Brahmin must be amerced a thousand, who approaches by force the secluded females of the regenerate tribes."† As to the text of *Sancha*,

* *Vivádatandava.*

† Ibid.

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"Of the three tribes, privation of substance and death are modes of punishment; but expulsion and branding are prescribed for the priestly order."* Here the term privation of substance extends to confiscation of the whole property, from its being placed in juxtaposition with the term death; as appears also from the following text, in which death and privation of substance are cited together: "Corporal punishment includes imprisonment, and even life; and a pecuniary fine of *panás*, &c. may extend to the whole property, from its being placed in juxtaposition with the term death." But the text, "He shall expel him from the country, leaving his property wholly untouched," relates to an offence of the lowest degree, and not to offences in general. Moreover, corporal punishment must never be inflicted on a Brahmin. *Menu*, having propounded generally, "Never shall the king slay a Brahmin, though practising all possible crimes," proceeds: "No greater crime is known on earth than slaying a Brahmin: and the king therefore must not even form in his mind an idea of killing a priest."†

Penalty for concealing evidence.

52. Moreover, the text, "He who having been called on for testimony, being influenced by his passions, conceals from others, should be punished eight-fold, and, if a Brahmin, should suffer banishment."‡ The meaning is, He who having accepted the office of a witness, and being called on for his evidence together with the other witnesses, being influenced by his passions, his mind being under the impulse of anger or the other passions, at the time of speaking, conceals

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* Ibid.

† Ibid. *Menu*, 8, § 380, first stanza, and 381.

‡ *Yájnyawalcya*, cited in the *Vivádatandava*.

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his evidence from the rest of the witnesses, saying, 'I am not a witness in this case,' should be amerced in eight times the amount awarded on the loss of the claim; and if a Brahmin, and unable to pay a fine equal to eight times the amount, he should suffer banishment: and the term *bibasum*, or banishment, may be here interpreted denudation, destruction of house and home, or banishment from the country, according to the circumstances of the case. But if persons of other tribes are unable to pay eight times the amount, they must be made to work at their several avocations, strictly confined, or sent to prison. The provisions of a former text also must here be attended to: When all the witnesses conceal, they are equally culpable.

Contradiction punishable.

53. But when, after giving their testimony, they afterwards contradict it, they must be punished with reference to the quality [of the parties], &c. as *Cátyáyana* has declared: "Persons having spoken, afterwards contradicting, should be amerced as prevaricators."*

Tampering with witnesses prohibited.

54. Witnesses cited by one party should not be secretly approached by the other, as *Náreda* has declared: "He shall not secretly approach a witness summoned by another; neither should he cause him to differ with another: a person so practising loses his suit."†

Standing mute and deposing falsely, enjoined *in favorem vitæ*.

55. Standing mute, and deposing falsely, have been generally prohibited on the part of witnesses. To this he pro-

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* *Vivádatandava.*

† *Smritichandricá.*

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pounds an exception: "A man may speak falsely, in a case involving death to any of the tribes."* Where it is probable that by speaking truth, death may happen to a *Sudra*, a *Vaisya*, a *Cshetrya*, or a *Brahmin*, there a witness may speak falsely: he should not speak truth. Therefore, by the prohibition of speaking truth, standing mute, and deposing falsely, on the part of witnesses, which were formerly prohibited, are now enjoined. Where, in an accusation supported by circumstantial or other evidence, if, by speaking truth, death will ensue to any of the four tribes, and by speaking falsely, death will not ensue to any one, in that case, falsehood is enjoined. But where by speaking truth, death will ensue to either the complainant or the defendant, and by falsehood also death will ensue to one or other party, there silence is enjoined, should the king consent. But should the king by no means admit of silence, the evidence should be nullified by contradiction; and if that cannot be effected, the truth must be stated: because, by speaking falsely, there will be the double offence of the homicide of one of the tribes, superadded to that of falsehood; but by speaking truth, there will only remain the offence of the homicide of one of the classes.

56. In this case, expiation must be performed according to law. Lest it should be supposed, that, in such case, standing mute and speaking falsely being enjoined by law, there is no offence, the text has been propounded: "A *Saraswatee* oblation must be presented by regenerate men for the

Expiation to be performed in such cases.

* *Yájnyawalcya*, cited in the *Vivádatandava*, and *Smritichandricá*.

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sake of purification from the offence."* For the sake of purification, that is, for the sake of removing the offence caused by standing mute or speaking falsely, a *Saraswatee* oblation must be severally presented by regenerate men. Belonging to the goddess *Suraswatee*, therefore called *Saraswatee*. The term *Churoo* signifies an oblation consisting of sound warm boiled rice.

57. The meaning is, that speaking falsely and standing mute, before prohibited, are here authorized. But the text, "That man is criminal, who either says nothing, or says what is false and unjust,"† relates to general falsehood or silence, and this is the expiation for transgressing that prohibition. It should not be supposed that the authority in the text is inconsistent, and argued, that although standing mute and speaking falsely have been authorized, yet that the offence arising out of a transgression of the general prohibition remains the same; because standing mute and speaking falsely is a graver offence on the part of witnesses, but falsehood and silence generally is a slighter offence. Therefore the text granting the authority is pertinent. Although in other instances the removal of the graver offence occasions the removal of its concomitant slighter offence, yet in this instance, from the expression of the authority and the injunction of the expiation, the graver offence is removed, and its concomitant offence, though slighter, is not removed. This is to be understood.

Objection noticed.

And replied to.

In this instance the graver offence is removed, though the slighter one remains.

* *Yájnyawalcya*, cited in the *Vivádatandava* and *Smritichandricá*.

† Last stanza of a text of *Menu*, 8, § 13.

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58. The authority to speak falsely must also be understood as extending to travellers and others in [answering] general questions, in cases where the lives of any of the tribes are in danger: nor is there any expiation in such case, from there being no express prohibition. No penalty shall attach to witnesses or others on the truth of the story appearing by another cause and at another time: this also is inferrible from the text. The Chapter on Witnesses is here concluded.

Expiation not incumbent on casual false witnesses.

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CHAPTER VII.

Of Written Proof.

SECTION 1.

1. Having treated of possession and witnesses, written proof is next propounded; but a writing is of two descriptions, public and private. The nature of a public writing has already been explained; a private writing is now treated of: this is of two descriptions,—prepared by the party himself, and prepared by others. That which is prepared by the party himself, requires no witnesses: that which is prepared by others, requires witnesses. The mode of proving these two depends on local and peculiar usages, as *Náreda* has declared: "Written evidence is declared to be of two sorts; *the first,* in the handwriting of the party himself, which need not have subscribing witnesses; and the *second,* in that of another person, which ought to be attested: the validity of both depends on the usage established in the country."*

General definition of written proof.

2. Next is propounded the rule regarding a writing prepared by others: "When any matter is mutually agreed

Rule respecting an instrument prepared by others.

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* *Vivádatandava, Smritichandricá,* and *Vyavaháramayúc'ha.*

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upon voluntarily, a writing must be drawn out with respect to it, with the insertion [of the name] of the obligor, and duly attested."* When any agreement is voluntarily entered into, or stipulation made mutually between the creditor and debtor, whether relating to gold or other *valuables*, then a writing must be executed, fixing the period of payment and the monthly rate of interest, for the purpose of establishing the fact on the expiration of such period; and it must be attested by witnesses of the description already mentioned. "With the insertion of the obligor,"—in which the obligor is mentioned, or in which the name of the obligor is mentioned in writing.

A contract may be binding without a writing.

3. Or else witnesses of the description before mentioned may be employed, as appears from the following text of the *Smriti*: "For the purpose of proving any act done by the party transacting it, witnesses may be relied upon in judicial proceedings. The act of a party may be good without a writing."†

Distinguishing marks to be inserted in a writing.

4. Moreover, "The year, month, fortnight, day, name, tribe, family, scholastic title, the names of the parties' fathers, &c. must be specified."‡ *The year*,—twelvemonth. *The month*,—as Cheyt and the like. *The fortnight*,—the light or dark half of the month. *The day*,—the first or other day of the moon's age. *The name*,—the name of the creditor and of the debtor. *The tribe*,—Brahminical or other. *The*

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* *Yájnyawalcya*, cited in the above authorities.

† *Vivádatandava*.

‡ *Yájnyawalcya*, cited in the *Smritichandricá* and *Vyavahára-mayúc'ha*, but uncertain in the *Vivádatandava*.

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family,—descended from *Vashistha* or other stock: with these, that is to say, with the year, &c. it must be distinguished; also with the *scholastic titles,* as the title of *Buhobrichha* or *Kutha,* assigned as the mark of distinction for reading a portion of the *Vedas. The names of the parties, fathers,*—that is, the names of the fathers of the creditor and debtor. By the term "&c." is intended the nature of the subject-matter, the occupation [of the parties]. The meaning, connected with what went before,* is, that the writing should be distinguished by these characteristics.

5. An agreement having been executed, the debtor should sign his name with his own hand, and should add, "what is above written is agreed to by me the son of such a one." A matter having been stipulated between the creditor and debtor, and the agreement having been determined and executed, the debtor, that is to say, the obligor, should subscribe his name with his own hand, and should moreover add or insert in the instrument, that what is above written is agreed to or approved by him the son of such a one.

The obligor should subscribe the writing.

6. "The witnesses also, being equal, should write with their own hands, specifying the names of their fathers, 'I, being sueh a one, am witness to this matter.'"† Those persons who are specified in the instrument as being witnesses should each, having specified his own and his father's name, individually write with his own hand, that he, such a one, *Devadutta* or the like, is a witness in the matter in question.

The witnesses also should subscribe.

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* Alluding to the text cited in verse 2.

† *Vivádatandava.*

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Being equal, signifies equality in point of number and qualifications.

Rule to be observed where the parties and their witnesses are ignorant of the art of writing.

7. If the debtor or the witnesses be ignorant of the art of writing, then the debtor and each of the witnesses by means of others, in presence of all the witnesses, must cause to be written their assent, as *Náreda* has declared: "That debtor who is ignorant of the art of writing, shall cause to be written his assent; or if the witness is ignorant, by means of another witness, in presence of all the witnesses."* Moreover: "The scribe must enter this: being solicited by both parties, by me the son of such a one, this has been written."† The scribe, being solicited by both parties, that is to say, by the obligor and obligee, should write at the foot of the instrument: By me *Devadutta*, or other name, the son of *Vishnamitra*, or other name, the above has been written.

Of a writing executed by the party himself.

A writing prepared by the party himself is now treated of. "But every document, which is in the handwriting of the party himself, is considered as sufficient evidence even without witnesses, unless obtained by force or fraud."‡ That instrument which has been executed by the obligor with his own hand, has been declared by *Menu* and other sages to constitute proof without witnesses, provided it were

* *Vivádatandava.*

† *Yájnyawalcya*, cited in the *Vivádatandava*, *Smritichandricá*, and *Vyavahúramayúc'ha.*

‡ *Yájnyawalcya*, cited in the *Vivádabhangárnava*, *Vivádatandava*, *Smritichandricá*, and *Vyavahúramayúc'ha.*

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not obtained by means of force and lesion.* By *force*,—violence. By *lesion*,—that which is effected under the influence of fraud, avarice, anger, fear, intoxication, &c.—provided it was not obtained by these means.' *Náreda* also has declared: "That writing is not proof, which is executed by a person intoxicated, by one under duress, by a female, by a minor, and that which is effected by force, and by intimidation, and lesion."†

9. And a writing executed by the party himself, or by means of another, should specify whether it is accompanied or unaccompanied by a pledge, should be drawn out according to peculiar local usages, and should not be deficient with respect to the import and language. This is all that is requisite. It is not necessary that its conditions should be expressed in classical or provincial language; as *Náreda* has said: "That which is not adverse to peculiar local usages, and declaratory of the nature of the transaction of a pledge. That instrument is termed proof, which is connected in import and language."‡ *Transaction* signifies making; the *transaction of a pledge*, the making a pledge: its *nature*, whether a simple deposit, or usufructuary, or for a specified period. Declaratory,—*making manifest.* Such

Mode in which it should be drawn out.

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* Compulsion by illegal distraint of liberty, or by intimidation of threats and penance of bodily harm, is duress. It vitiates a contract or obligation extorted by its means.—*Colebrooke on Obligations and Contracts*, Part I, p. 235. Lesion, presumptive of imposition or oppression, is a ground of rescinding any contract, executory or executed. —*Ibid*, p. 234.

† *Vivádatandava*, but *Hareeta* cited in the *Smritichandricá*.

‡ *Vivádatandava* and *Smritichandricá*.

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is the meaning of the terms : declaratory of the nature of the transaction of a pledge. *Connected in import and language:* the import and the language—the terms in which these are preserved in due order. By this is meant " connected in import and language."* Such a writing is proof. Here it is not requisite, as in the case of a public and royal instrument, that it should be expressed in classical language.

A bonded debt claimable from the son and grandson of the obligor.

10. In treating of the instrument, it may be mentioned, that the debt specified therein should be discharged by three persons : " A debt specified in writing must be paid by three persons alone :"† as in the case of a debt contracted in the presence of witnesses, it must be paid by three persons, so in the case of a bonded debt, it must be paid by the obligor, his son, and grandson, but not by the fourth in descent, or those after him. This is ordained.

Objection answered.

11. Should it be objected, that a text has already declared universally : " By sons and grandsons, a debt must be discharged,"‡ by which it is already provided, that a debt must be paid by three persons, it is admitted : but the above text has been propounded to preclude the supposition, that in the case of bonded debts, there is, in another text, any exception to the precept. Thus, having treated of the nature of a bond, it has been declared by *Cátyáyana :* " Such contracted by the ancestors must be discharged after the lapse

* It is not practicable to render a faithful translation of the original in this place, the disquisition being intended to exemplify the rule for forming the Sanscrit compound designated *Buhobrihi.*

† *Cátyáyana*, cited in the *Vivádatandava.*

‡ *Ratnácara.*

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of time."* *Such* alludes to the bonded debts. The debts of the ancestors must be discharged by their representatives, even though a long time may have elapsed. Here by the use of the plural number "*ancestors*," and the mention of the lapse of time, it might be inferred that the debts must be discharged by the fourth in descent, and those after them. Moreover, the text of *Hareeta*, "He will obtain payment who holds a bond."† Here also it might be inferred, from the general mention respecting the payment of the debt to any person holding a bond, that by the fourth in descent, and those after them, payment should be made. To obviate such a supposition, the above text has been properly recited. The two last-mentioned texts must be reconciled to the injunction of *Yogeeshwara*.

The text has been recited to exonerate the fourth in descent.

12. He states an exception: "A pledge may be enjoyed until the debt is repaid."‡ This text has been recited, lest it should be supposed, from the number being limited to three, that in the case of a bonded debt accompanied by a pledge, he who is exempt from the payment is also not entitled to redeem the pledge; and it implies, that until the debt is discharged by the fourth or fifth in descent, the pledge may be enjoyed: it follows, that the fourth, or those after him in descent, are entitled to adjust a debt accompanied by a pledge. Should it be objected, that this exception is superfluous, from the occurrence of a former text, "An usufructuary pledge§

Case in which the fourth and others in descent may adjust the debt.

* *Vivádatandava.*

† *Veeramitrodaya.*

‡ *Cátyáyana*, cited in the *Vivádatandava.*

§ Cited in the Chapter on Pledges.

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is not forfeited,"* it is replied, that were it not for this exception, that text might be considered to extend to three persons only. All this is irrefragable.

A new instrument may be executed in certain cases, by the consent of the parties.

13. Having disposed of incidental topics, the original subject is now reverted to. "An instrument being in another country, or badly written, or destroyed, or effaced, or stolen, or torn, or burnt, or divided, he shall cause another to be executed."† By this text it is directed, that he shall execute another when the *original* instrument is insufficient to prove the transaction; and its insufficiency to prove the transaction consists, as declared, in its being in another country, or in its being badly written, &c. *Badly written,* signifies, when the writing is bad, in consequence of the words or characters being written in a corrupt, equivocal, or unintelligible manner. *Destroyed,*—by lapse of time. *Effaced,*—in consequence of the ink having become pale, or by other means, when the writing is rubbed out. *Stolen,*—by thieves or others. *Torn,*—pulled to pieces. *Burnt,*—by fire. *Divided,*—split into two; and this holds good by the consent of the plaintiff and defendant.

Mode of proceeding when the parties object to the execution of a new instrument.

14. "But if they disagree, and the instrument be in a country remote from the scene of litigation, a period of time calculated with reference to the distance must be allowed for its production: or if the instrument be in a distant country, or destroyed, the case may be decided by having recourse to witnesses, as *Náreda* has declared: "In the case of an in-

* A part of the last stanza of the above text.

† *Yájnyawalcya,* cited in the *Smritichandricá,* but *Cátyáyana* in the *Vivádatandava.*

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strument being deposited in another country, or destroyed, or badly written, or stolen. Should it be in existence, time *must be allowed:* should it not be in existence, ocular evidence must be resorted to."* A period of time must be allowed for the purpose of producing an instrument which is in another country, in existence, and forthcoming. But should it not be in existence, and not forthcoming, the case must be decided by having recourse to the ocular evidence of such witnesses as have formerly seen it. But where there are no such witnesses, the decision must be according to a divine test; as appears from the text, "Recourse must be had to a divine test, in a case where there is no writing or witnesses."†

15. And this relates to a private document; the same rule is applicable to an official document, but there is this distinction: "In all cases, that is termed an official document, which is signed with the king's hand, and sealed with his seal in witness thereof."‡ What is termed an official document.

16. Another species of official document has been defined by *Vriddha Vasistha:* "That is termed a decree, which comprises the matter adduced to be proved, the answer, the pleadings, and the decision, sealed with the royal seal, and signed by the chief judge and others. The subject-matter being proved, he shall give the decree to the Of a favourable decree.

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* *Vivádatandava* and *Vyavahâramayúc'ha.*

† *Vivádatandava,* but *Cátyáyana* cited in the *Vyavahâramayúc'ha.*

‡ *Vasistha,* cited in the *Vivádatandava,* but *Náreda* in the *Smritichandricá.*

§ *Vivádatandava* and *Smritichandricá.*

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hands, that they, being sons of such and such persons, approve the judgment; from the following text of *Menu:* "Those assessors who are there present, conversant in the holy texts, shall give their signature under their own hands, according to the rule for writings."* The case is not divested of embarrassment, unless all the assessors are unanimous, as *Náreda* has declared: "Where all the assessors are unanimous in opinion that [such a decision] is right, the case is divested of embarrassment; otherwise, it remains embarrassed."† This applies to a suit consisting of four divisions, from the text: "That which establishes the thing to be proved, which consists of four divisions, and which bears the royal seal, is termed a decree *pro*."‡

Of an unfavourable decree.

17. But where there is a loss [of the suit], "as in the five cases, One who contradicts, a prevaricator, one who does not attend, one who stands mute, and one who being summoned absconds;"§ in such cases there is not a favourable decree, but a decree *contra*. This is [awarded] for the purpose of adjudging amercement at a future period.||

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* Cited as the text of *Cátyáyana* in the *Veeramitrodaya* and *Smritichandricá*.

† *Vivádatandava.*

‡ *Vivádatandava*, but cited as the text of *Vrihaspati* in the *Smritichandricá.*

§ *Vivádatandava.*

|| It was before laid down in Chap. ii, Sec. 1, §§ 8, that one who is non-suited is to be fined; but he does not therefore forfeit all claim to the subject-matter, and the text here merely means that a judgment of non-suit is to be recorded, with the view of amercing the party in default.

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But a decree *pro* is for the purpose of establishing a plea of former judgment. This is the distinction.

Mode of clearing up doubt from a contested document.

18. He next treats of the means of clearing up doubt from a document. "In a disputed case, the document must be proved by the handwriting of the party or the like, by reasonable inference, *by evidence of* the contract *which the instrument records*, by a *peculiar* mark, by connexion *and dealings of the party*, by *the contents of* the document, or by *previous recourse* to measures *for recovery*."* The ascertainment of the fact, whether a document is genuine or fabricated, may be by those who wrote it. The meaning is, that a document may be proved by means of another document written by the same person, and if the writing assimilates, this is one method of [clearing up.] From the term "or the like" must be understood the comparison of the handwriting of the attesting witnesses and the scribe, by means of other documents. *Reconcilement to* means of probability, is the meaning of the term "*reasonable inference;*" reconcilement of the relation between the property, and the time, place, and persons, that at such a time, and in such a place, such a person is likely to have possessed so much property. This is what constitutes *reasonable inference. By evidence,* means, that of the attesting witnesses. *By a peculiar mark,* some distinguishing mark, such as *sri,* &c. *By connexion,*—that is, the former relation of money transactions between the parties on account of mutual

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* Uncertain in the *Vivádatandava,* but *Yájnyawalcya* cited in the *Vivádabhangárnava, Smritichandricá,* and *Vyavaháramayúc'ha.*

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winning party."§ The assessors also shall give it under their confidence; and by inference is also implied the consideration as to the probability of the receipt of so much property from such a person. These are the means, and the import is, that by these means doubt attaching to a document may be cleared up. But where the doubt as to a writing cannot be cleared up, there recourse must be had to witnesses for the purpose of decision, as *Cátyáyana* has declared: "Where a document is impugned, the claimant must adduce the witnesses named therein."* This text relates to a case where the witnesses are forthcoming. But where they are not forthcoming, the text of *Hareeta* applies: "Having impugned a document, by saying, This document was not executed by me, but has been fabricated by him, the decision must be by divine test."†

Mode of proceeding where the debtor is unable to discharge the whole debt at once.

19. In answer to the question, what is to be done after the doubt has been cleared up, and payment caused to be made of the debt, if the debtor should not be able to discharge the whole debt, he replies: "The debtor, having paid by degrees, shall record [the payments] on the back of the document, and the creditor shall write with his own hand the amount of the receipts."‡ If the debtor is unable to discharge the whole amount of the debt, then, having paid by degrees, according to his ability, he shall record on the back of the original document, So much has been paid by me; or the creditor

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* *Vivádatandava.*

† Ibid.

‡ Ibid.

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shall account, on the back of the original document, for the sums realized or received by him, and record that so much has been repaid to him. In what manner? By a record of his own hand, or under his own handwriting; or the creditor should give to the debtor a written receipt for what has been repaid, drawn up in his own handwriting.

20. He next proceeds to declare how the document should be disposed of, the whole debt being discharged. "Having discharged the whole debt, he should tear up the writing, or cause another to be executed for acquittance."* Having discharged the debt, whether by degrees or all at once, he should tear up the original writing. But if such writing be in an inaccessible country, or be destroyed, then, for acquittance or putting an end to the debtorship, the debtor should cause the creditor to execute another writing, and in like manner the creditor should give to the debtor a deed of acquittance. This is the meaning. He next declares what is to be done on the discharge of a debt attested by witnesses. "The repayment of an attested debt should be attested."† One should repay an attested debt in the presence of its former witnesses. Thus ends the Chapter of documentary evidence.

What is to be done after the discharge of the debt.

Those who witnessed the loan should witness repayment also.

* *Yájnyawalcya*, cited in the *Vivádatandava*.

† The last stanza of the above text.

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CHAPTER VIII.

Of Evidence by Divine Test.

SECTION 1.

1. The three-fold description of human evidence, writings, witnesses, and possession, have been propounded. Now being about to treat of divine test in its proper place, he states the general definition of a divine test in five texts, commencing with the text: "The balance, fire, water," &c. He now declares, the divine tests, "The balance, water, fire, poison, and sacred libation, are the divine tests for purgation."* According to the sacred code, five ordeals, commencing with the balance, and ending with sacred libation, are to be administered for the purpose of purgation, or the removal of suspicion in a doubtful matter.

Five principal methods of ordeal.

2. But [should it be objected,] that there are other ordeals, such as grains of rice, &c. as expressed in the text of *Pitamaha*, "The balance, fire, water, poison, and sacred libation, and grains of rice, are ordeals. Hot metal forms the seventh mode."† And how then can there be only those enu-

There are altogether seven methods of ordeal.

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* *Yájnyawalcya*, cited in the *Vivádatandava* and *Vyavahára-mayúc'ha.*

† *Vivádatandava.*

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merated? It is replied, that these are for heavy charges. The restrictive meaning is, that these are for heavy charges, and not otherwise. It is not meant that they are the only ordeals. He will hereafter describe the meaning of a heavy charge. But [should it be objected,] that in trifling charges also, the sacred libation is made use of, from the text, " In a trifling case, the sacred libation is to be administered:" it is admitted; but the enumeration of the sacred libation, together with the balance and the rest, is not intended to confine its use to heavy charges, but for the sake of including [its use] in a charge supported by a binding asseveration, otherwise it might be confined to the case of a presumptive charge, from the text, " He should administer the ordeals of the balance and the rest to persons under a charge supported by asseveration, but in cases of presumptive charge, grains of rice and sacred libation: in this there is no doubt."*

Scales, and the other four methods of ordeal, to be used in certain cases.

3. No distinction having been laid down between heavy charges, whether presumptive or supported by a binding asseveration, in the case of an accuser binding himself to abide by the award [in case of failure], he propounds an exception: " These, the balance and the rest, are for a person accused, where the accuser binds himself to abide by the award."† The award is the fourth division of the suit, involving defeat or success: by it the penalty is ascertained. Abiding by that, is abiding by the award, and he obtains the penalty annexed to such award.

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* *Vivádatandava.*

† *Yájnyawalcya*, cited in the *Vyavahároamayúc'ha.*

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An ordeal may be resorted to, in proof of a negation, as well as of an affirmation.

4. "The claimant shall immediately reduce to writing the evidence of the thing to be proved."* This rule has been propounded relative to a claimant who maintains the affirmative of a proposition. He now propounds an exception: "By consent, either party may have recourse to it. Either may abide by the award."† By consent, that is, by the mutual agreement of the accuser and the accused, either the accuser or the accused may have recourse to ordeal, and either the accuser or the accused may abide by or take on himself the award of corporal or pecuniary penalty. This is the meaning. An ordeal is not like human evidence, confined to an affirmative only; but it extends indiscriminately both to affirmatives and negatives. So that in the case of a total denial, or a special plea, or plea of former judgment, ordeal may be resorted to at the option either of the complainant or defendant.

Different ordeals applicable to different accusations.

5. The ordeal of sacred libation may be resorted to in trifling charges, or heavy charges, or those which are presumptive, or those which are supported by a binding asseveration, indiscriminately. This has been said. But the ordeal of the balance, down to that of poison, is only applicable to heavy charges, and those which are supported by a binding asseveration. But an exception has been propounded to the rule, as far as regards binding asseverations: "Let him act without binding himself to abide by the award, in the case of treason against the king, and of a grievous offence."‡ Let him have recourse to the balance

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* *Vide supra*, Chap. 1, Sec. 6, § 1.

† *Vyavaháramayúc'ha.*

‡ *Vivádatandava* and *Vyavahàramayúc'ha.*

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and other ordeals, without abiding by the award, in an accusation of treason against the king, or in an accusation of killing a Bráhmin or other grievous offence; also in an accusation of heinous robbery, as has been declared in the text: "Let an ordeal be administered, without binding by the award, in the case of persons suspected by the king, and those implicated by robbers,* and those intent on their own justification."† But the ordeal by grains of rice is only for petty thefts, as appears from the text of *Pitamaha*: "The ordeal by grains of rice is to be administered in cases of theft, but not in other cases. This is certain."‡ The ordeal by hot metal§ is to be used in cases of robbery of magnitude, as appears from the text, "The ordeal by hot metal has been propounded for those who are accused of robbery."||

Other divine tests described.

6. Moreover, other divine tests are used on trifling occasions. "By his veracity, by his horse or elephant, and his weapons, by his kine, grain, and gold, by the deities, by his ancestors, and by [the relinquishment of the fruit of] virtuous actions; or let him touch the heads of his children, and wife, and intimates, or in an accusation admitting of it,¶ the

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* Although from the fact of robbers being unworthy of belief, the mere implication by them should not raise suspicion, yet as the term "of those implicated by robbers" has been used in conjunction with "persons suspected by the king," suspicion is excited.—*Subodhini.*

† Cited as the text of *Náreda* in the *Vivádatandava.*

‡ Ibid.

§ This ordeal, called *Tuptamasha*, is performed by taking gold or other metal from clarified butter while hot.

|| Ibid.

¶ The printed copy of the *Mitácshara* has it *Surveshoo*, in all accusations; but the true reading, as explained by *Subodhini*, is *Sukyeshoo*, admitting of it.

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sacred libation."* These divine tests propounded by *Menu*, are declared by *Náreda* and others to be applicable to trifling occasions. Should it be asserted, that ordeal is a means of decision where human evidence is not to be resorted to, and that oaths are, according to popular acceptation, ordeals, [it is replied,] there has been a distinction propounded between these and the ordeals of the balance, &c. the effect in the latter case being immediate, and, in the former, future, as in the terms *Brahmin* and *Puribrajuka*.† But the sacred libation, though enumerated among oaths, is classed with the ordeal of the balance, &c. not because the effect of it, in common with the ordeal of the balance, &c. is immediate, but because, in common with those, it is applicable to weighty charges, and charges supported by a binding

Distinction between an oath and an ordeal.

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* *Náreda*, cited in the *Vivádatandava* and *Vyavahàramayūc'ha*.

† The import of this illustration is, that ordeals and oaths are not convertible terms. The meaning has been thus explained by *Subodhini*: "As the separate mention of the term *Puribrajuka* indicates another purpose, so the separate mention of oaths indicates, that they are intended for another purpose. That purpose has already been declared, [in assigning their use to trifling occasions,] or the meaning of the use of the terms *Brahmin* and *Puribrajuka* may be thus exemplified. Invite a *Brahmin*, and invite a *Puribrajuka*. In this sentence, by the mere injunction to invite a *Brahmin*, the injunction to invite a *Puribrajuka* also may be comprehended, [inasmuch as all *Puribrajukas*] or *Suniasees* are *Brahmins*, though all *Brahmins* are not *Puribrajukas*; and the separate injunction to invite a *Puribrajuka*, proves that the *Brahmin* and the *Puribrajuka* must be considered as distinct individuals. So also in this instance, although the balance and the rest, and oaths, may both be comprehended under the designation of ordeal, yet, from the separate use of the terms oath and ordeals, the term ordeal must be considered as distinct from the oath, and as relating to the balance and other similar ordeals.

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And between different kinds of ordeal.

asseveration. But the ordeal by grains of rice and hot metal are not classed with the ordeal of the balance, &c. although the effect of both modes is immediate, because they are applicable to trifling occasions and presumptive charges. These ordeals and divine tests are to be resorted to in cases of debt and other occasions, according to circumstances.

Text of *Pitamaha* explained.

7. But the text of *Pitamaha*, " In actions relative to immoveable property, ordeals are to be avoided,"* is explained by the interpretation, that they are to be avoided, in case documents and neighbouring witnesses are forthcoming. Should it be objected, that in other actions also, recourse cannot be had to ordeals, where there exist other means of proof,—it is admitted: but in actions for debt and the like, should witnesses of the prescribed qualifications be adduced by the plaintiff, and should the defendant bind himself to abide by a penalty and rely on an ordeal, then an ordeal may be resorted to, because there may be the fault of partiality in witnesses, and because there cannot be any fault in an ordeal, from its being an indication of the reality and an emblem of justice, as *Náreda* has declared: " Justice consists in truth, and litigation [is dependant] on witnesses. In a case admitting of divine test, recourse need not be had to oral or documentary evidence."† The text of *Pitamaha* is propounded, not for the purpose of excluding ordeals altogether, but for the purpose of excluding the supposition, that in actions relative to immoveable property, the decision by ordeal may be resorted to by a defendant

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* *Vivádatandava* and *Vyavahárama yūc'ha.*

† *Vivádatandava.*

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who binding himself to abide by a penalty, relies on ordeal, there being documents and neighbouring witnesses. Should this not be [the interpretation], then in actions relative to immoveable property, there could be no decision in the absence of documents and neighbouring witnesses.*

Ceremonies to be observed with respect to ordeals in general.

8. Moreover: "Having called the person, fasting, at sunrise, who has bathed with his clothes on, let him administer all ordeals in presence of the prince and of Brahmins."† The judge shall administer the ordeals, having called the person who is subjected to them in the morning, at sunrise, fasting, having bathed, in his clothes, in the presence of the prince and of the attendant Brahmins. "Ordeals are to be administered for purgation always to a person fasting for three nights, or fasting for one night."‡ The difference here propounded by *Pitamaha* as to the degree of fasting must be regarded in practice according as the matter is grave or trifling, great or small. The rules regarding fasting, should be applied also to the officiating chief judge, from the text of *Náreda:* "Let the chief judge transact all matters by ordeal, fasting, in the same manner as sacrificing priests conduct sacrifices by order of the king."§

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* The meaning is, that in actions relative to immoveable property, where the plaintiff adduces documents or the evidence of neighbouring witnesses, the defendant cannot have recourse to an ordeal; but in the absence of such evidence, he may have recourse to an ordeal in actions relative to immoveable property, notwithstanding that the plaintiff adduces other evidence.

† *Vivádatandava.*

‡ Ibid.

§ *Pitamaha,* cited in the *Vivádatandava.*

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Different times propounded for different ordeals.

9. Although the time of sunrise is here propounded without distinction, yet, by approved practice, ordeals are to be administered on Sundays. "In the morning the ordeal of fire, in the morning the ordeal of the balance must be administered, in the forenoon that of water must be administered, by a person desirous of discovering the truth. The purgation by sacred libation is propounded for the first part of the day. In the latter part of the night, when it is very cool, the ordeal by poison must be administered."* These distinctions propounded by *Pitamaha* must be observed. As no particular time has been propounded for the ordeals of grains of rice and hot metal, they must be administered in the morning, from the following general injunction of *Náreda:* "The administering of all ordeals has been declared proper in the morning."†

Particular seasons enjoined for particular ordeals.

10. The day being divided into three parts, the first part is termed the morning, the second, the forenoon, the third, the evening. The distinction of time must depend on the cases of the injunction or prohibition. The cases of injunction [are now declared.] The frosty and cold seasons, and the rainy seasons, are declared [the proper times] for [administering the ordeals by] fire. Water in the autumn and summer season. Poison in the frosty and wintry, and in the months of Cheyt, Aghun, and also Bysakh; these three months are common, and not adverse to any ordeals. Sacred libation may be given at all times; and the balance is not confined to any particular period."‡ The use of the term sa-

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* *Vivádatandava* and *Vyavahdramayúc'ha.*

† *Vivádatandava.*

‡ *Náreda*, cited in the *Vivádatandava*, but *Pitamaha* in the *Vyavahdramayúc'ha*, excepting the last hemistich.

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cred libation, is intended to include all oaths. As no distinction has been propounded for [the ordeal of] grains of rice, it is not limited to a particular period.

Particular seasons prohibited.

11. The cases of prohibition are as follows:—" Purgation should not be by water in the cold weather; nor should purgation be by fire in the warm weather; nor should one administer [the ordeal by] poison in rainy weather, nor that of the balance in windy weather; nor in the afternoon, nor in the evening, nor in the middle of the day."* The word "cold," mentioned in the text, "Purgation should not be by water in the cold weather," includes the wintry, frosty, and rainy seasons. The word "warm," mentioned in the text, "Nor should purgation be by fire in the warm weather," includes the summer and autumn season. Although the injunction was before laid down, the prohibition is used for the sake of giving greater effect. The object will be hereafter propounded. He now treats of the condition of the persons.

Ordeals for particular persons.

12. "Ordeal by balance is declared for women, minors, old men, blind and lame persons, Brahmins, and sick persons. Fire or water, or seven barleycorns of poison, for a man of the servile tribe."† The term *women*, implies females in general, without respect to distinction of tribe, age, or condition. The term *minors*, signifies one who has not attained his sixteenth year, without respect to tribe. *Old men*,—those who have passed their eightieth year. *Blind*,—

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* *Náreda*, cited in the *Vivádatandava*.

† Cited as the text of *Yájnyawalcya* in the *Vivádatandava* and *Vyavahâramayûc'ha*.

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deprived of vision. *Lame persons,*—whose feet are useless. *Brahmins,*—persons of that tribe generally. *Sick persons,* —those afflicted with disease. The [ordeal by] balance alone is declared fit for the purgation of these. A red-hot plough-share, or hot metal for a *Cshetrya,* and water for a *Vaisya,* as appears from the disjunctive term "or." Seven barley-corns of poison are for the purgation of a man of the servile tribe; and from the declaration of the balance being for *Brahmins,* and from the declaration in the text, "or seven barley-corns of poison," that poison is the ordeal for a *Sudra,* it is proper to apply the ordeals of fire and water to *Cshetryas* and *Vaisyas.* This has been explicitly declared by *Pitamaha:* [" Ordeal by] balance is to be administered to a *Brahmin,* and fire to a *Cshetrya.* Water is declared for a *Vaisya;* and one should cause the [ordeal by] poison [to be administered to] a *Sudra.*"* But the text depriving females of ordeal, namely, "When the truth is sought after, an ordeal will not be administered to those who are doing penance, or severely afflicted, or sick, or devotees, and women,"† has been recited for the purpose of taking away the alternative [allowed in other cases,] namely, "By consent, either party may have recourse to it."‡ It has moreover been declared: In charges accompanied by a binding asseveration, women and the like being the parties charged,

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* *Vivádatandava.*

† *Náreda,* cited in the *Vivádatandava.*

‡ See verse 4. In other words, where women and the other persons specified are either party in a cause, it shall not be optional for either party to have recourse to ordeal; but the ordeal should be resorted to by the party, who may not be involved in the disqualifying text. But where both parties are women, or fall under any other of the specified exceptions, there the general rule applies. [illegible]

the ordeal is to be administered to those making the charge; and where these [that is to say, women] are the parties making the charge, the ordeal [is to be administered] to the party charged; but where they mutually accuse each other, there is an option: and here also [the ordeal by] balance alone is enjoined for women. It appears also from the explanation of the same text, that the balance alone is for women and others in presumptive charges of weighty and other offences; but the text becomes applicable by restricting the ordeal of women by balance to the months of Cheyt, Aghun, and Bysakh, which are applicable to all ordeals and not [by interpreting it that the ordeal by] balance alone is at all times [proper] for women. This appears from the text, [The ordeal by] "poison has not been declared for women, nor has that by water been propounded; by the balance, by the sacred libation, and the rest, their hidden secrets must be explored,"* which enjoins the balance, sacred libation, fire, &c. excluding poison and water. The same rule is applicable to minors, and the others [enumerated]. The injunction as to the use of the ordeal by balance, &c. for Brahmins and the rest, is not to make it alone admissible at all periods, as is evident from the text of *Pitamaha:* "The purgation by sacred libation is declared applicable to all tribes. All these are declared applicable to all, except poison to Brahmins."† Hence the text has been propounded for the purpose of determining that the ordeal is to be by balance, &c. in a period which is common to all ordeals, and where many ordeals would be admissible.‡

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* *Náreda*, cited in the *Vivádatandava.*

† *Vivádatandava* and *Vyavahdramayúc'ha.*

‡ This explanation is rather tortuous. The meaning, however, is this. The general injunction is, that during three months of the year, (Cheyt, Aghun, and Bysakh,) any mode of ordeal is admissible. The

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Continuation of the subject.

13. But at any other period, the ordeal appropriated to that period for all. In the rainy season, fire alone is for all. In the wintry and frosty seasons, there is an option either of fire or poison to *Cshetryas* and the other two tribes, but only fire to Brahmins, and never poison, from the prohibition, "except poison to Brahmins." In the autumn and summer seasons, only water. But to such as are afflicted with a peculiar disease, in which the use of fire and water is prohibited, such as those described in the following text, "Let one keep away fire from leprous persons, and water from the feverish, and let one keep away poison from those oppressed with bile and phlegm:"* to them, even at the proper time for fire and other ordeals, let the ordeal of the balance, and others which are common to all times, be administered. "Water, fire, and poison must be administered to persons in health."† From this text it is inferrible, that to them, as well as to weakly persons, the ordeals suitable to the tribe, condition, and age of the parties are to be administered, without contravening the seasons and periods fixed by the injunctions and prohibitions.

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particular injunction follows, that to women, Brahmins, &c., the purgation by balance alone should be administered. There are other texts, however, which declare that any ordeal, except poison and water, may be administered to women, and that any except poison may be administered to Brahmins. It becomes, therefore, necessary to reconcile these conflicting texts, which is done by stating, that in the three months above specified the ordeal by balance alone should be administered to women, Brahmins, and the rest. By the same rule, in those months, fire should be the ordeal for a *Cshetrya;* water for a *Vaisya*, and poison for a *Sudra.*

* *Hareeta*, cited in the *Vivádatandava.*

† *Vivádatandava.*

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14. It has been declared,* "These are for heavy charges." He now explains what constitutes a heavy charge. "One should not take a [red-hot] ploughshare under a thousand, nor poison, nor the balance." One should not administer the ordeal of a ploughshare, of poison, or of the balance, under a thousand *panas*: nor that of water, which is included, as has been declared: "In heavy charges, one should cause to be administered the ordeal of the balance, down to that of poison."† In such cases, that of sacred libation should not be resorted to, from the text, "In a trifling case, sacred libations are to be administered."‡ The above four § ordeals are to be administered in cases where [the subject-matter] exceeds a thousand *panas*, but not under. This is the meaning.

What is termed a heavy charge.

15. But [should it be objected], that fire and the other [three] ordeals have been declared by *Pitamaha* applicable to cases under a [thousand] in the following text, "One should administer the balance in the case of a thousand; in the case of half a thousand, iron; in the case of half the moiety, water. Poison is declared applicable in the case of half of that."|| It is admitted, but the text of *Pitamaha* applies to a case where the taking involves degradation, and the text of *Vijnyaneswara* applies to other cases. This is the practice, and these two texts apply to cases of robbery and aggression.

Objection replied to.

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* Verse 2.

† *Veeramitrodaya.*

‡ Ibid.

§ That is, the ploughshare, poison, the balance, and water.

|| *Veeramitrodaya.*

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Distinction in civil and criminal cases.

17. A distinction has been propounded by *Cátyáyana* in the case of a denial. "In the case of a denial of receipt, evidence must be resorted to. But in cases of robbery and aggression an ordeal may be administered, even though the subject be trifling."

And with reference to the amount of the suit.

17. Having ascertained the amount of all the property, it should be made into gold, [that is] having ascertained the number of the *suvernas*,—if a hundred be lost, poison has been declared the ordeal; and also if eighty have been lost, fire. If sixty have been lost, water is to be administered; or if forty, the balance; and sacred libation is propounded in the case of the loss of twenty or ten. In case of the loss of five or more, or half, or a quarter of that number, grains of rice. In a case involving the loss of half or a quarter of that again, let him, the deponent, touch the heads of his sons or other relations. But in a case involving the loss of half or a quarter of that again, the usual means have been enjoined. A king so distinguishing suffers no injury spiritually or temporally."*

Explanation of the above text.

18. "Having ascertained the number of *suvernas*," &c. Here the term *suverna* means [sixteen *mashas*; and the word *suverna* is used to signify the quantity above specified. The term loss here is intended to suppose denial. "One should not take the ploughshare under a thousand."† This must here be understood to mean a thousand copper *panas*.

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* *Vivádatandava*.

† Vide *supra*, § 14.

19. But should it be objected, that in accusations of treason against the king or other grievous offence, these ordeals have been ordained : how then can the text, " He should not take the ploughshare under a thousand," apply? It is replied : " Where the king is a party, and the accusation is grave, being pure, they should always take these ordeals :"* (that is,) in accusations of treason against the king or other grievous offence, being purified by fasting and the other means, they should perform these ordeals, without reference to the amount of the property (involved).

20. The particulars as to place have been detailed by *Náreda.* In a public assembly, in the gate of the king's palace, in the temple of the deity, and in the plain. It must be fixed, immoveable, and worshipped with frankincense, chaplets of flowers, and ointments. It—the balance, must be fixed.

21. The situation has also been detailed by *Cátyáyana.* " Let him establish it in *Indra's* place of worship for those accused of weighty offences and grievous sinners : at the king's gate for those intending treason against the king. The ordeal must be given where four roads meet, to those born in the inverse order of the tribes ; and in other cases, let the ordeal be given in the midst of the assembly. This let the wise know. The decision should not be made by the king, in the case of those offenders who serve persons unfit to be touched, and vile, or of barbarians. In a case of doubt, he should administer to those the ordeals in common use among them.

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* This is the second hemistich of the text commencing, " One should not take," &c.

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SECTION 2.*

Of the Ordeal by Balance.

Mode of proceeding with respect to.

1. Having treated of the introduction to ordeals, which applies to ordeals of every description, he now propounds the nature of the ordeals by the balance and the rest. "The accused being placed in the balance by persons acquainted with the mode of holding the scales, and being balanced by an image, a line having been made, and (the accused) being taken down, he should invoke the balance with the following prayer :—'Thou, O balance! art the mansion of truth: thou wast constructed of old by the gods; then, O fortunate one, declare the truth, and relieve me from suspicion. If in this I did commit a crime, O mother! then do you bring me down; but if I am innocent, lift me up.'"†

Interpretation of the text.

2. By goldsmiths and others, who are familiar with the practice of holding the scales or weighing by them, the accused, or the accuser, or he who is about to undergo the ordeal, being balanced or brought to a level, by means of an image, made of earth or other materials, and being placed or seated on the scales, having made a line, or having drawn a chalk mark in the vicinity of the place where he

* Some apology is perhaps necessary for exhibiting to the public the puerilities contained in the following pages, but the account has been given with the view of showing the entire system. The substance of the doctrine of Hindu ordeals is contained in the first volume of the Asiatic Researches, and from that publication the account has been transferred to the Encyclopædia Britannica, in which there is a curious description of the ordeals in use in former times and by other nations.

† *Yájnyawalcya*, cited in the *Divyatatwa* and *Veeramitrodaya*.

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(the weigher) stands, under the strings of the balance, while in the act of balancing by means of the image, and being taken down, he should invoke the balance, or should pray to it with this invocation :—" O balance ! thou art the abode of truth. " *Of old*,"—in the beginning of the creation. " *By the gods*,"—by *Hirunyagurbha* and other deities. " *Wast constructed*,"—or created. " *Then*,"—or therefore declare " *the truth*,"—or show the real nature of a doubtful matter. " *O fortunate*,"—or O propitious ! relieve me from this suspicion. O mother ! " *if I did commit a crime*,"—or if I utter a falsehood, then bring me down ; but " *if I am innocent*,"—or speak truth, then lift me up."

3. The invocations are specified by other authorities, which are to be used by the chief judge when invoking the balance. That which has been stated, applies to the person about to undergo the ordeal. As that which constitutes success or defeat may be understood from the terms of the invocation, it has not been separately treated of. But the construction of the scales, the mode of ascending them, and other matters requiring explanation, have been clearly treated of by *Pitamaha, Nádreda*, and others. **Invocation to be used by the party undergoing the ordeal.**

4. " Having cut down a tree suitable for sacrifice with a *muntra*, and using the formula as to a sacrificial pillar, (*Yoopa*,) and having made obeisance to the regents of the world, (*Lokapalas*,) the balance should be constructed by intelligent persons. The *muntra* of *Soma** must be repeated at the time of cutting down the trees."† **Tree to be cut down with certain ceremonies.**

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* *Soma*, or the moon, being the god of the woods.

† *Pitamaha*, cited in the *Divyatatwa* and *Veeramitrodaya*.

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5. " The (beam of the) balance should be made equilateral, strong and straight; and three rings should be attached in three places, as necessary. The (beam of the) balance should be made four hands long, and the two posts (to which it is attached) should be made equal to it (in dimensions.) The intervening space between the two posts should be two hands, or one hand and a half. Both posts should be fixed under ground (in depth) two hands. Two *(Toranas)* or cross bars should be fastened to each side of the posts; but these must always be placed ten fingers higher than the scales. Two *Abalumbas* or perpendiculars should be attached to the cross bars, made of earth, secured with string, and hanging down so as to touch the top of the scales or basons. The balance must be placed to the eastward; immoveable, and in a purified place."*

Method of constructing the balance.

Method of weighing.

6. " Having adjusted the two strings to both the extremities (of the beam), he should place *Cusa* grass in each of the scales in an easterly direction. He should place the person who is about to undergo the ordeal in the western scale or bason, and pure earth in the other side. He should cause the cavities of the basons to be filled up with brickdust, gravel, or earth."† The mention of brickdust, gravel, or earth, shows that either of them may be used. " Examiners should be appointed, who are acquainted with the manner of weighing, as traders, goldsmiths, and braziers. The duty of the examiners is to see that the perpendiculars and the

* *Pitamaha*, cited in the *Divyatatwa* and *Veeramitrodaya*.

† *Pitamaha*, cited in the *Divyatatwa*, but *Náreda* in the *Veeramitrodaya*.

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basons are even. Water should be placed in the scales by *Pundits*, and, if the water does not flow over, it may then be considered that the balance is level. Having first weighed the individual, let him then be taken down."*

7. "The balance should also be decorated with banners and flags; afterwards the person acquainted with the meaning of the formula should invoke the gods; the offerings of perfumes, garlands, and sandal ointments having been presented in the prescribed mode, accompanied by the music of the *Vaditra*† and *Tooryaya*.‡ The chief judge, facing the east, with hands folded, should thus speak: 'O *Dharma*, enter into this ordeal with all the regents of the world, (*Lokapalas*,) *Vasus*,§ *Adityas*,|| and *Marutas*.'"¶ **Forms and ceremonies to be observed on the occasion.**

8. "Having first invoked *Dharma*, or the god of justice, to enter into the balance, he should then call on the *Angas*, or subordinate deities. Having placed *Indra* on the east, and *Pretesa*** on the south, *Varuna* on the west side, and *Cuvera* on the north; *Agni*, and the other regents of the

* *Pitamaha*, cited in the *Veeramitrodaya* and *Divyatatwa*.

† A sort of musical instrument, of which four species are reckoned, as wind instruments, stringed instruments, &c.

‡ A sort of musical instrument.

§ A *Vasu* is one of the eight divinities who form a *Gunna*, or assemblage of gods; and there are nine of these *Gunnas*.—*As. Res.*, p. 40, vol. iii.

|| The twelve *Adityas* are said to be the offspring of *Aditi*, who is called the mother of the gods. They are emblems of the sun for each month of the year.

¶ *Marutas*, or genii of the winds.—See *Moor's Hindu Pantheon*, p. 93.—*Pitamaha*, cited in the *Veeramitrodaya* and *Divyatatwa*.

** *Yama*, or literally, the lord of departed spirits.

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Worship of the regents of the world.

world, he should place on the intermediate points (of the compass.) The colour of *Indra* is yellow, of *Yama* dark blue, of *Varuna* white as crystal, of *Cuvera* golden, and *Agni* also golden, of *Nirriti* dark blue.—*Vayu* is celebrated as being of a purple or smoky colour, and *Isana** is of a red colour. These must successively be thus meditated on."†

Of the *Vasus*.

9. "The wise should worship the *Vasus* on the south side of *Indra*. *Dhara, Dhruva, Soma, Apa, Anila, Anala, Pratyusha,* and *Prabhasha*; these eight are termed *Vasus*."‡

Of the *Adityas*.

10. "A site for the *Adityas* should be made between those of *Indra* and *Isana*. *Dhata, Aryayama, Mitra, Varuna, Ansa, Bhaga, Indra, Vivaswan, Pusha, Paryanna,* these ten, and *Twashtwa* and *Vishnu,* the elder and the younger born: these are the names of the twelve *Adityas*."§

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* *Divyatatwa*, that *Isana* is of a white colour.

† *Pitamaha*, cited in the *Veeramitrodaya* and *Divyatatwa*.

‡ *Pitamaha*, cited in the *Divyatatwa*.

§ *Pitamaha*, cited in the *Divyatatwa*.—It is recorded in the *Puranas*, that the twelve *Adityas* were begotten by *Casyapa* on his wife *Aditi* in a *Calpa*, and their names correspond with the above, with the exception of *Vishnu*, *Paryanna*, *Ansa*, and *Indra*, instead of which they are read *Savita*, *Vidhata*, *Sacra*, and *Urucrama*; and in another *Calpa*, *Sunga*, the daughter of *Viswacarma*, was married to *Aditya*, and as she was unable to endure her husband's splendour, she complained to her father, who made him (the *Aditya*) into twelve pieces, each of which appears to represent him as *Surya* or the sun, distinct in each month of the year. It is mentioned in the *Adityahridaya*, that *Aroona* appears in the month of Magh; *Surya* in Falgoon; *Vedunga* in Cheyt; *Bhanoo* in Bysakh; *Indra* in Jeth; *Rabi* in Asarh; *Gab'husti* [illegible] Sawun; *Yama* in Bhadoon; *Soovurnareta* in Assin; *Divacara* [illegible] Cartic; *Mitra* in Aghun; and *Vishnu Sunatana* in Poos. The legend is related differently by Ward.—See vol. ii. p. 45; and Moor, Article "*Aditya*."

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11. "The wise should make a site for the *Roodras** on the west of *Agni.* *Virabhadra, Sumbhoo, Grisa* who is most famous, *Ajaicapuda, Ahi, Budhnya, Pinakee, Aparajita, Bhoovanadhiswara, Capali,* termed *Vishampati* or lord of the *Vaisyas,* and *Sth'hanurbhava;* these are the eleven *Roodra* deities."† Of the *Roodras.*

12. "The abode of *Matris* should be made between that of *Pretesa* and the *Racshas*:‡ *Brahmi, Maheswari, Caumari, Vaishnuvi, Varahi, Mahendri,* and *Châmunda* attended by her *Ganas* or train: (these are *Matris.*"§) Of the *Matris.*

13. "The wise should make an abode for *Gunes* || on the north of *Nirriti.*"¶ Of *Gunes.*

14. "The site of the *Marutas* is said to be on the north of *Varuna.*—*Gagana, Sparsuna, Vayu, Anila, Maruta,* Of the *Marutas.*

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* See Moor, Article "*Roodra.*" The *Roodras* are distinctions of *Siva* in his character of fate or destiny.

† *Pitamaha,* cited in the *Divyatatwa.*

‡ The *Racshas* are a species of evil genii, generally engaged in malignant combinations; not however always.—*Moor's Pantheon,* p. 96.

§ *Pitamaha,* cited in the *Divyatatwa.*—The eight *Sactis,* or energies of as many deities, are also called *Matris* or mothers. They are named *Brahmi,* &c. because they issued from the bodies of *Brahma* and the other gods respectively. (*Raya Mucuta* on the *Ameracosha.*) In some places, they are thus enumerated: *Brahmi, Maheswari, Aindri, Varahi, Vaishnuvi, Caumari, Châmunda,* and *Charchica.* However, some authorities reduce the number to seven; omitting *Châmunda* and *Charchica,* but inserting *Cauveri.*—See *As. Res.,* p. 82, vol. viii.

|| The god of prudence and wisdom.

¶ Regent of the south-west quarter.—*Pitamaha,* cited in the *Divyatatwa.*

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Pran, *Pranes*, and *Jiva*; these eight are called *Marutas*."*

Of *Doorga*

15. The wise should invoke *Doorga* on the north of the balance; and all these deities should be worshipped by their respective names."†

Offerings to be presented.

16. "Having made offerings, beginning with *Arghya*,‡ and ending with ornaments, in the first place to *Dharma*: then the offering beginning with *Arghya* and ending with ornaments should be made to the *Angas*. Next the offerings beginning with perfumes and ending with food should be presented to them."§

Mode in which the worship is to be performed.

17. Having decorated the balance with flags and banners, *Dharma* should be invoked with this incantation, *(Ahyahi,)* Approach! Approach! Then having pronounced this *muntra*, *Dharmayarghyaum praculpayami numa*, or I present this *Arghya* to *Dharmâ*: after this *Arghya*, *Padya* (water for cleaning the feet, &c.), *Achmani* (water for sipping), *Madhuparca*,|| then *Achmani* again, *Snan* (water for bathing), dress, the sacrificial cord, then *Achmani* again, the *Cataca* or ring, *Mukuta* or crest, and other ornaments should be presented to *Dharma*: then having repeated the mun

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* *Pitamaha*, cited in the *Divyatatwa*.

† *Pitamaha*, cited in the *Divyatatwa*.

‡ An *Arghya*: that is, water, rice, and *durvá* grass in a conch, or in a vessel shaped like one.

§ *Pitamaha*, cited in the *Divyatatwa*.

|| This is made with honey, curds, and butter in a vessel of [illegible].

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tra, beginning with the word *Pranava*, and ending with *Numa!* the presents, beginning with *Arghya*, and ending with ornaments, should be offered in succession to the other deities, beginning with *Indra* and ending with *Doorga* in their respective names in the fourth case; afterwards having offered perfumes, flowers, incense, lamps, food-offerings, and the like to *Dharma*, then the perfumes, &c. are to be offered, as above stated, to *Indra* and the other deities. For worshipping the balance, the perfumes, flowers, &c. must be of a red colour, as *Náreda*, says:—"Having first worshipped the balance with the offerings of red perfumes, garlands, curds, fried rice, &c. then the other deities should be worshipped." As no particular mention has been made regarding *Indra* and the other deities, they may be worshipped with offerings of every colour, whether red or otherwise, as procurable. —This is the order of worship.

18. These acts must be performed by the chief judge, as has been declared:—"The chief judge,—who should be a Brahmin, learned in the *Vedas* and *Vedangas*, familiar with religious observances, as ordained by the *Sruti*, even-minded, devoid of passion, devoted to truth, pure, able, benevolent, universally charitable,—fasting, clothed in purified garments, and with cleansed mouth, should, according to the prescribed mode, worship all the deities."* Qualifications of the officiating chief judge.

19. By four *(Rriticas)* or family priests, seated on the four sides of the balance, the *homa* should be performed on the *(Lowkicagni)* or domestic fire,† as has been declared:— The *Gayatri* to be repeated.

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* *Pitamaha*, cited in the *Divyatatwa*.

† Radhacant Deb in his Sanscrit Lexicon observes:—*Agni* was first begotten by *Dharma* on his wife named *Basu*. *Agni* espoused *Swaha*,

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"The burnt offering (*homa)* should be presented on four sides by the learned in the *Vedas;* the *homa* should be performed with the presents of *Ajya* (clarified butter,) *Habisa* (rice boiled with milk,) and *Samida* (small branches of certain trees;) the *homa* should be celebrated with the *muntra,* beginning with *Savitri Pranava* and ending with the word '*Swaha.*'"* Having pronounced the *Savitri Gayatri,* and then the *Gayatri* beginning with the word *Pranava* and ending with the word *Swaha,* the *homa* should be performed by offering the *Ajya, Charoo,* and *Samida,* one hundred and eight times severally.—This is the meaning of the text.

The accusation should then be written with a *muntra,* and placed on the head of the accused.

20. After the completion of the worship of the deities, ending with the burnt offering, a document should be prepared, containing the matter alleged [against the party about to undergo the ordeal,] together with the following *muntra;* and that document should be put on the head of the person accused; as is said:—"The matter of which the person is accused should be written down with this *muntra,* and that [the document] should be placed on the head [of the accused]."† The *muntra* is:—"The sun, moon, wind, fire, heaven, earth, water, mind, *Yama,* day, night, both (morn-

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of whom were born *Pavaca, Pavamana,* and *Suchi.* In the sixth *Munwantara, Dravinaca* and others were begotten by *Agni* on his wife *Basudhara,* and forty-five *Agnis* were procreated by *Dravinaca* and others, sons of *Agni.* They are altogether forty-nine in number. In particular religious observances and ceremonies, *Agni* is to be invoked by several names, thus in *Lowkica* or worldly affairs, such as entering into a new house, and the like, *Agni* is termed *Pavaca,* &c., &c.

* *Divyatatwa.*

† Ibid.

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ing and evening) twilights, and *Dharma*, know the actions of men."*

21. These forms, beginning with the invocation to *Dharma*, and ending with placing the written charge on the head, are applicable to all ordeals; as has been declared:—" All these formulæ he should apply to all ordeals: so the invocation of the gods should be made in the same manner."† The above ceremonies applicable to all ordeals.

22. Afterwards the chief judge should invoke the balance from the text:—" The person who knows the *muntra* should, according to the prescribed mode, invoke the balance."‡ " *Who knows the muntra*," that is, who is acquainted with its meaning. " O balance, thou wert created by *Brahma* for the detection of evil-doers, by the letter *d'ha* thou art the image of *Dharma*, and, by the letter *tha* it appears that, holding the vicious, thou revealest their acts, on account of which thou art named *D'hatha* or balance. Thou knowest the virtues and vices of all created beings. Thou only knowest all, and those things which mortals do not know. This person wishes to be relieved from the suspicion in which he is involved, as thou, by thy virtue, art competent to extricate him from the difficulty."§ Invocation by the chief judge.

23. The person who is about to be examined, should invoke the balance with the text formerly recited, (" Thou, O Balance," &c. § 1,) and afterwards the chief judge should The person about to undergo the ordeal, should also invoke before being weighed.

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* *Divyatatwa.*

† Ibid.

‡ Ibid.

§ *Divyatatwa* and *Veeramitrodaya.*

place the person who is about to undergo the ordeal, and has taken the written charge on his head, in the same place; that is, in the mode according to which he was first placed in the scale; as has been said :—" The person who has taken the written charge on his head, should be again placed in the scale."*

Period of weighing

24. Having been placed in the scale, he should be kept in it during the period of five *binarhis* complete. Persons learned in astronomy should be appointed to compute that period, as the text declares :—" The Brahmins who are eminently skilled in astronomy, should be appointed for the purpose of computation, and by those, the time of examination must be considered as five *binarhis*."† The time taken for articulating ten hard letters makes a *pran* : six *prans* make a *binarhi* ; as is said :—" [The time of pronouncing] ten hard letters is a *pran*, six *prans* are one *binarhi*."‡ Sixty *binarhis* are one *ghatica* : sixty *ghaticas* are one day and night, and thirty days are one month.

What persons should be appointed, to decide as to the question of guilt or innocence.

25. Purified persons should be appointed by the king, to examine during such period into the guilt or innocence of the accused, and they should pronounce as to his innocence or guilt; as has been said by *Pitamaha* :—" Brahmins are the most excellent of witnesses. They, being speakers of truth, according to the real state of the case, learned, purified, and uncovetous, should be appointed as evidence by the king;

* *Divyatatwa* and *Veeramitrodaya.*

† *Divyatatwa.*

‡ Ibid.

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they should represent to the king regarding the guilt or innocence of the accused."*

26. The rule for ascertaining the guilt or innocence is thus propounded:—" No doubt, should the person balanced go up, his innocence is established; if he be level, or come down, then he is not innocent."† An exception to this rule is declared by a text of *Pitamaha*:—" A slight crime brings level, and a heavy one takes down."‡

Rule for ascertaining the point.

Exception.

27. The meaning of this is, that though it cannot be ascertained by the ordeal, whether the matter charged be light or heavy, yet that [the offence] having been committed once only and unintentionally, renders it light, and its having been repeatedly done and intentionally, renders it heavy; and thus the rule of slight and heavy amercement and penance may be ascertained.

Explanation of the exception.

28. Where, without any known or visible cause, the *Cácsha* and the like are cracked or broken, guilt is established. The text declares:—" In case of the *Cácsha* breaking, or of the splitting of the beam and basons of the scale, or of the *Carcatas*, or the bursting of the strings, or of the *A'csha* breaking, the guilt of the person is evidenced."§

Other evidence of guilt.

29. " *Cácsha* signifies the bottom of the string; *Carcata*, the rings bent like the horn of a ram, attached to each ex-

Explanation of the terms.

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* *Divyatatwa.*

† Ibid.

‡ Ibid.

§ Ibid.

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tremity of the beam to which the strings are fastened; *A'csha* the transverse beam fixed to the two pillars, from which the scales are pending. If these, however, are broken by any visible means, the person must be again placed in the scale; a text says:—"At the breaking or splitting of the strings or other parts of the balance, he should cause the person [the accused] to be replaced in it."*

Distinction.

Fees to be paid to the officiating priests.

30. He should then cause the *Rriticas, Purohitas,* and *Acharyas,* or sacrificial priests, to be satisfied with their fees. "The king who performs such acts, having tasted the most delicious enjoyments, acquires eminent fame and becomes identified with *Bramha.*"†

Precaution to be adopted when the scales are required for future use.

31. If he wish to establish the balance, as above described, in the same place [for future use], he must build a hall with shutters and the like, to prevent the entrance of crows and other animals, as the text declares:—"He should cause to be erected a large, elevated, and white balancing hall, situated in a place in which it may not be injured by dogs, *Chandalas,* and crows. He should surround the house with the *Lokapalas,* or regents of the world, and other deities; and they [the *Lokapalas*] must be worshipped thrice in the day, with perfumes, garlands, and sandal ointments. He should cause the house to be made with shutters, filled with seeds, guarded by servants, and containing earth, water, and fire, so as not to be empty."‡ "*Seeds,*" grains of barley, rice, and the like.—Thus has been declared the ordeal by balance.

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* *Divyatatwa.*

† Ibid.

‡ *Pitamaha,* cited in the *Veeramitrodaya.*

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Section 3.

Of the Ordeal by Fire.

1. He now declares the [ordeal by] fire as next in order. Having his hands rubbed with rice, he should place seven leaves of the *Ashwathha** tree, and should tie them with so much thread."† There being general rules, as described in the introduction of the trial by ordeal, and there being peculiar rules for [the ordeal by] balance, from the invocation of *Dharma*, to the placing the written charge on the head inclusive, this is a peculiarity in the form of [ordeal by] fire. **Forms to be observed in this ordeal.**

2. "*Rubbed with rice,*" means, he by whom both his hands have been rubbed or cleaned with rice.—Having made a stain with lac dye, or other material, on the spots where there were moles, freckles, warts, scars, sores, &c. as *Náreda* has ordained:—"In all the hurts of the hand he should make vermilion marks."‡ Afterwards he should place seven *Ashwathha* leaves in the palms of the open hands, from the text:—"Having filled the palm of the hand with seven equal *Ashwathha* leaves."§ He should next tie them up together with the hands by as many threads as there are *Ashwathha* leaves; that is to say, he should tie them with seven. These seven threads should be white, as appears from the text of *Náreda*:—"He should tie **Explanation of the text.** **Other ceremonies to be observed.**

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* *Ficus religiosa.*

† *Yájnyawalcya*, cited in the *Divyatatwa* and *Veeramitrodaya.*

‡ *Divyatatwa* and *Veeramitrodaya.*

§ *Veeramitrodaya.*

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the hands with seven strings of light coloured thread."* He should then place seven *Sumee*† leaves, and seven blades of *Doob* grass, with fried grain, and fried grain mixed with curds, on the top of the *Ashwathha* leaves, from the text:— "He should place seven leaves of the *Pippala*‡ tree, seven *Sumee* leaves and fried grain, seven blades of *Doob* grass, and fried grain mixed with curds."§ He should also place flowers, as appears from the following text of *Pitamaha*: —"He should place in the hands seven leaves of the *Pippala* tree, fried grain, jasmine, and curds, and then tie them up with thread."|| "*Jasmine,*" a species of flower.

Arca leaves to be used only when the *Pippala* leaves are not procurable.

3. As for the text, "He is clear who is unburnt to the seventh circle holding redhot iron in his hands wrapped up in seven leaves of the *Arca*¶ plant."** That must be understood as prescribing the use of *Arca* leaves, where *Ashwathha* leaves cannot be had. The leaves of the *Ashwathha* must be considered the principal, from their having been extolled in the following text of *Pitamaha*:— "Fire is produced from the *Pippala* tree. The *Pippala* is considered as the chief of trees. Therefore a wise man should place the leaves of it in the hands."††

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* *Divyatatwa*, and *Veeramitrodaya.*

† *Mimosa pudica*, a sort of sensitive plant.

‡ The holy fig-tree, or *ficus religiosa.*

§ *Divyatatwa.*

|| *Divyatatwa*, and *Veeramitrodaya.*

¶ *Asclepias gigantea*, or *Swallow wort.*

** *Vyavahâramayûc'ha.*

†† *Veeramitrodaya.*

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4. He next propounds the invocation to fire by the party undergoing (the ordeal):—" Thou, O purifying fire, dwellest in the interior of all creatures. Thou, O fire, pronounce, like a witness, the truth of my innocence or guilt."* Thou, O fire, dwellest in the interior—within the corporeal system of all creatures, whether viviparous, oviparous, engendered by heat and damp, or produced from the earth: thou art present by the preparation of food adapted to each. O purifier, or cause of purity: O fire, that provest the innocence of the distressed, speak like a witness the truth of my innocence or guilt. *Poonyupapabhiu* (innocence or guilt) is the fifth case, formed by rejecting the affix *lyup*. The meaning is: speak or declare the truth with reference to innocence and guilt.

Invocation to be used by the party undergoing the ordeal.

5. The ball of iron being heated by three ignitions, and being brought before him by means of a pair of tongs, the party undergoing the ordeal, standing in the western circle with his face to the eastward, should invoke the fire with the *formula:* according to *Náreda:*—" Having heated, with a three-fold ignition, a redhot, shining, polished iron ball, he should speak, invoking truth."†

Position of the accused.

6. The meaning is this. For the purpose of cleaning the iron, having cast the redhot iron ball into water; having again heated it and cast it into water, and having heated it by a third ignition, and it being extracted and placed before him, by means of a pair of tongs, the party about to perform

Explanation of the text.

* *Divyatatwa* and *Veeramitrodaya.*

† *Divyatatwa.*

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(the ordeal) should utter the *formula* of, "Thou, O fire, &c." invoking truth—or calling on the name of truth.

Ceremonies to be performed by the chief judge.

7. The chief judge, having placed a common fire at the south side of the extremity of the circles, should perform the burnt offering with clarified butter, repeating the *formula* "*Agnaye Pavacáya Swaha,*" one hundred and eight times, from the text:—"For the purpose of pacifying it, he should make an offering to the fire, of clarified butter one hundred and eight times."*

Invocation to be used by the chief judge.

8. Having performed the burnt offering, and having thrown the ball of iron into that fire, and that being redhot, and having performed the ceremonies already described, commencing with the invocation to *Dharma,* and ending with the burnt offering; at the third ignition, he should invoke the fire inherent in the iron ball with this *formula*: —"Thou, O fire, art the four *Vedas,* and thou officiatest at sacrifices. Thou art the mouth of the gods. Thou art the mouth of deified sages. Thou dwellest in the interior of all creatures, therefore knowest thou the good and bad. By reason that thou cleansest from sin; therefore art thou called purifier. Show thyself, O purifier, flaming in case of guilt, but in case of innocence, O fire, become cold. Thou, O fire, pervadest the system of all creatures, like a witness. Thou only, O deity, knowest what mortals do not comprehend. This man is arraigned in a cause, and desires acquittal. Therefore thou art capable of delivering him lawfully from this perplexity."†

* *Vyavahárαmayúc'ha* and *Veeramitrodaya.*

† *Divyatatwa* and *Veeramitrodaya.*

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9. Moreover :—" He should place in both hands of him who has spoken, an iron ball of fifty *palas,** smooth and redhot."† "*Of him,*" meaning the party who is to perform the ordeal; "*who has spoken,*" who has recited the *formula* of "Thou, O fire, &c.;" "*iron,*" a ball made of iron; "*of fifty palas,*" equal in weight to fifty *palas;* "*smooth,*" divested of all excrescences, on all sides round and polished. It should be eight fingers‡ in circumference, from the following text of *Pitamaha* :—" Having made a ball free from excrescences and smooth, eight fingers in circumference, and fifty *palas* in weight, he should heat it in the fire."§ "*Redhot,*" like fire. The chief judge should place or deposit it [the hot ball] in both hands covered with *Ashwathha* leaves, curds, *Doob* grass, and other materials.

Dimensions and description of the redhot ball with which the ordeal is to be performed.

10. He next propounds what he should then do :—" He, taking it, should proceed exactly through seven circles slowly."|| That man, taking the redhot iron ball in the palm of his hands, should proceed slowly through the seven circles. By the use of the term "exactly" *(eva),* he shows that the feet are to be placed within each circle, and that the circles are not to be stepped over, as *Pitamaha* has said :—" He should not overstep a circle, nor should he place his foot behind."¶

The accused is to walk through seven circles.

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* A weight of gold or silver equal to four *carshas.*

† *Yájnyawalcya,* cited in the *Divyatatwa.*

‡ *Angoola,* a finger's breadth, a measure of eight barleycorns.

§ *Vyavaháramayúc'ha, Divyatatwa,* and *Veeramitrodaya.*

|| *Yájnyawalcya,* cited in the *Divyatatwa.*

¶ *Divyatatwa.*

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11. He should proceed exactly through seven circles slowly. This has been said. He next declares what is the extent of each circle, and what is the extent of the intervening space between the circles:—"The circle must be held to consist of sixteen fingers and so much the last."* That of which there are sixteen fingers is consisting of sixteen fingers. The circle must be considered as measuring sixteen fingers, and the last and middlemost of the circles exactly the same; that is, exactly sixteen fingers. By prescribing that he shall proceed through seven circles, it follows, that the first circle is the starting place, and that there are besides seven other circles of the extent specified. This has been declared by *Náreda* in his specification:—"They have declared thirty-two fingers between one circle and another. By the eight circles in this manner, there are two hundred fingers and forty fingers of land, over and above, in measurement."†

Extent of the circles.

12. The meaning of this is that, after the starting circle, which measures sixteen fingers, follows the first circle, which, together with the second and each succeeding one, measures, with the intervening space, thirty-two fingers. The starting circle alone measures sixteen fingers. The seven circles are to be walked over together with the intervening spaces consisting of thirty-two fingers. By the eight circles, in this manner, there are two hundred and forty fingers in measurement. The word *Angoolamanatah*, "fingers in measurement," is formed by affixing *tusih* to the crude noun.

Explanation of the text.

* *Yájnyawalcya*, cited in the *Veeramitrodaya*.

† *Veeramitrodaya*.

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13. In this process, however, having made a starting circle of sixteen fingers, and having divided, into two parts, each of the other seven circles or portions of land, consisting, with their intervening spaces, of thirty-two fingers, passing over the seven portions of land, or circles consisting each of sixteen fingers which form the intervening space, seven circles proportioned to the size of the foot of the person about to walk, should be made in the remaining circles, which also consist each of sixteen fingers, as has been said by him also:—" He should make the measure of this circle equal to his foot."*

Small circles are to be made within the larger ones.

14. It has also been said by *Pitamaha*:—" He should make eight circles, and after them a ninth. The first to be called (the circle) of fire, the second of *Varuna*, the third of the wind, the fourth of the deity *Yama*, the fifth of the deity *Indra*, the sixth of *Cuvera*, the seventh of *Soma*, the eighth of *Suvita*, the ninth of all the gods. This the wise have determined. They have declared thirty-two fingers between one circle and another. By the eight circles, in this manner, there are two hundred fingers and fifty-six fingers of land in measurement. Another circle is to be made, equal in measurement to the foot of the person about to walk. In each of the circles *Cusa* grass must be placed, as prescribed by the *Shasters*."† From these texts it follows, that, excluding the ninth circle, called the circle of all the gods, for which no particular measurement of fingers has been specified, by the eight circles and their intervening spaces, each consisting of sixteen fingers, two hundred and fifty-six fingers are taken up: still as there are only seven

Enumeration of the circles, according to the text of *Pitamaha*.

* *Yájnyawalcya*, cited in the *Vyavaháramayúc'ha*, *Divyatatwa*, and *Veeramitrodaya*.

† *Vyavahúramayúc'ha*, *Divyatatwa*, and *Veeramitrodaya*.

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circles to be travelled over, in the first of which he stands, and in the ninth of which he drops (the hot iron), there is no discrepancy.

Enumeration of the terms of measurement.

15. The measurement of an *angoola* or finger's breadth is this: eight *yuvas*, or very small barleycorns, make an *angoola* or finger. This is declared to be the measure of an *angoola*; but twelve *angoolas* or fingers make one *vitesti* or span; two *vitestis* or spans make one *husta* or cubit; four cubits make one *danda* or staff; two thousand of them make one *crosa*, and eight thousand of them make one *yójana*. This must be understood.

If the hand is burnt, he is criminal;

16. Having gone over the seven circles, what is to be done? In answer to this, he says:—"He obtains acquittal, if, having relinquished the fire, his hands being rubbed with rice, he is unburnt."* Standing in the eighth circle, and dropping the redhot iron ball in the ninth circle, and rice being rubbed on both his hands, if his hands are unburnt, he obtains acquittal. But if his hands are burnt, he is criminal. This is the true meaning.

But not, if he is burnt elsewhere.

17. He who, trembling through fear, is burnt elsewhere than in his hands, is not on this account criminal, as *Cátyáyana* has said:—"A person trembling under an accusation, if he is burnt elsewhere than in the proper place, the gods consider him as unburnt, and to him he should again cause (the ordeal) to be given. The ball falling in the intermediate space, or in a case of doubt, he should again take it."†

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* *Divyatatwa.*

† *Yájnyawalcya*, cited in the *Divyatatwa.*

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18. When the ball of the person, in the act of walking, falls in the intermediate space, or short of the eighth circle, or where there is a doubt as to whether he is burnt or unburnt, he should then take it again.—Thus has the inferred meaning been declared.

19. And here the substance of the ceremony is recapitulated. Having performed the *Bhoota Shoodhee* on the day but one before: having on the day before constructed the circles as prescribed by law: having worshipped the inferior deities presiding over the several circles respectively: having prepared the fire: having completed the *Shanti homa* or propitiatory sacrifice to it: having placed the iron ball in the fire: having gone through the invocation to *Dharma*, and the worship of all the deities ending with the burnt offering: having performed the ceremony of rubbing with rice the hands of the person undergoing the ordeal, he being fasting, having bathed, and standing in his wet clothes, in the westernmost circle, and the paper containing the articles of charge being tied with the proper *muntras* on his head; the chief judge, having invoked the fire at the ignition, and taking the redhot iron ball with a pair of tongs, should place it, being worshipped by the person undergoing the ordeal, in the palm of his hands; and he having gone through the seven circles, and dropped it in the ninth, if unburnt is innocent.—This is the law relative to fire. Recapitulation of the ceremony.

Section 4.

Of the Ordeal by Water.

1. He now propounds the rule regarding the (ordeal by) water:—"He (the accused) having used this invocation, 'Preserve me, O *Varuna*, by declaring the truth,' should Forms to be observed in this ordeal.

enter the water, holding the thigh of a person immersed up to his navel."*

Explanation of the text.

2. "*Having used this invocation,*" or having invoked the water with this *formula*, "O *Varuna*, by declaring truth, preserve me;" the person who is about to undergo the ordeal, having grasped the thigh of a person immersed up to his navel, that is, of a person standing in water of sufficient depth to reach his navel, should enter or plunge into the water.

Varuna must be worshipped after the other prescribed ceremonies have been gone through.

3. This must be done after the worship of *Varuna*, as appears from the text:—"The purified (chief judge) first shall perform the worship of *Varuna* with perfumes, garlands, *Soorabhi* (a sweet smelling substance), honey, milk, clarified butter, &c."† This must be done after the invocation of *Dharma* and the other deities, and after the worship and burnt offerings shall have been performed, and the written charge placed on the head with the prescribed *formula*; such being the general rule applicable to all ordeals.

Invocation to be used by the chief judge.

4. "Thou, O water, art the life of all creatures. Thou wast contrived at the beginning of the creation. Thou art celebrated as the purifier of all nature, animate and inanimate. Therefore do thou exhibit thy real essence for the discovery of good and evil."‡ After the chief judge shall have made the above invocation to the water, the person about to un-

And by the accused.

* *Yájnyawalcya*, cited in the *Divyatatwa*, *Vivádatandava*; but *Vyasa*, in the *Vyavahâramayúc'ha*.

† *Náreda*, cited in the *Divyatatwa*, *Vivádatandava*, and *Vyavahára-mayúc'ha*.

‡ *Pitamaha*, cited in the *Divyatatwa* and *Vivádatandava*.

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dergo the ordeal should thus invoke the water, "Preserve me, O *Varuna*, by declaring the truth."*

5. By *Náreda* have been declared the places fit to be used for the ordeal by water:—"[The ordeal should be administered] in a river gently flowing [*Nadi*], the ocean [*Sagur*], a rivulet [*Vaha*], a pond [*Hrada*], a mountainous cavity [*Devakhata*], a pool [*Tadaga*], and a lake [*Sara*."†] *Pitamaha* also ordains:—"He (the accused) should dive into still water, but neither too deep nor too shallow. It should be devoid of weeds and aquatic plants, and free from leeches and fish. He may administer the ordeal by means of that water which is contained in mountainous cavities. He should always avoid a reservoir and a rapidly flowing river. He must always have recourse to such water as is free from waves and mud."‡

Enumeration of the different descriptions of water fit for the ordeal.

6. The term "*reservoir*" means water which has been brought from a pool, lake, or elsewhere, and emptied into a copper or other cistern.

Meaning of the term reservoir.

7. The person standing in water up to his navel, holding a *Dharma sth'hoona* or sacred pillar, made of a tree suitable for sacrifice, should remain there, with his face to the east quarter; as appears from the text, "Having held a sacred pillar, he should remain in the water with his face to the east quarter."§

The person who stands in the water, should hold a pillar.

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* Vide *Supra*, § 1.

† *Divyatatwa*, *Vivádatandava*.

‡ *Vivádatandava*.

§ *Divyatatwa*.

Mode of ascertaining innocence.

8. What shall be done after this? It is replied:—"A swift runner shall then hasten to fetch an arrow discharged at the moment, and if, while the runner is absent, he appears immersed, he should obtain acquittal."*

Explanation.

9. At the same time that the accused plunged into water, a strong person should discharge an arrow, and another swift runner proceeding to the spot where the arrow fell, having brought the arrow so discharged, if he, upon his return, see the person under the water, then he is entitled to acquittal.

Another mode described.

10. It has been described also in the following manner. After three arrows shall have been discharged, a swift runner, having proceeded to the place where the second arrow has fallen, and having taken it up, should remain there, and another swift runner should remain at the place from whence the arrow was discharged under the *Torana* or signal post. After they have thus taken up a position, a third person should clap his hands, and the person who is about to undergo the ordeal should immediately dive under the water, at which instant the person standing under the signal post should run to the spot on which the second arrow fell, and, on his arrival, the person who took up the arrow, should hasten to the signal post, and if, on his return, he do not see the accused immersed under water, then he is condemned. This has been clearly declared by *Pitamaha.*

As declared by *Pitamaha.*

11. "The running and diving, of the runner and the person who is about to undergo the ordeal, should be simultaneous. A swift runner should proceed from the foot of the

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* *Vyavahāramayūc'ha.*

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signal post to the target: afterwards the second one should quickly bring the arrow. He should go from the foot of the signal post, to the place where the first person went. If, on the return of him who took up the arrow, he do not see the accused out of the water, but entirely immersed under it, then his innocence must be admitted."*

12. *Náreda* has defined what constitutes a swift runner: —"Among fifty runners two who can run most quickly, should be appointed to bring the arrow."† What constitutes a swift runner.

13. The signal post should be made to come up to the ear of the person who is about to undergo the ordeal, and fixed on an even ground in the vicinity of the place where he is about to undergo immersion. The text of *Náreda* declares:— "A signal post as high as the ear [of the accused] should be erected on level and purified ground, on the edge of the water in which he is to be immersed."‡ Description of the signal post.

14. He [the chief judge] should first worship three arrows and a bow made of bamboo, with auspicious offerings, white flowers, &c. as *Pitamaha* has declared:—"He [the chief judge] having first worshipped the arrows and the bow made of bamboo, with auspicious offerings, incense and flowers, should afterwards proceed to perform the rite, [that is, to administer the ordeal]."§ Bow and arrows to be worshipped.

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* *Divyatatwa.*

† *Divyatatwa* and *Vyavahárama.yūc'ha.*

‡ *Divyatatwa.*

§ *Vyavahiramayūc'ha.*

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Dimensions of the bow, and distance of the target.

15. By *Náreda* have been declared the dimensions of the bow and [distance] of the target. "Seven hundred fingers [in length] is a *kroora d'hanú* or dreadful bow; six hundred is a *madhyama* or moderate, and five hundred is a *munda* or inferior bow; know this to be the rule of the bow.* A skilful archer having made a target one hundred and fifty cubits distant, should discharge three arrows from a moderate bow, but not from any other. The archer is blameable if the arrows go beyond or fall short of the target."† Or the term "*seven hundred*" may be construed seven fingers more than a hundred [as being the measure of] a *kroora d'hanú* or dreadful bow; so the terms six hundred and five hundred [may be construed similarly.] Thus the measure of a *kroora d'hanú* or dreadful bow would be eleven fingers more than four cubits, of the *madhyama* or moderate bow ten fingers more, and of the *munda* or inferior bow nine fingers more.

Arrows how to be made.

16. The arrows must be made of bamboo, but without an iron head, as appears from the text:—"An arrow without an iron point should be made for the purpose of the trial, and formed from the branch of a bamboo without knots, and the archer should discharge it with all his might."‡

Who should be the archer.

17. He should appoint as the archer, a person fasting, a *C'shetriya* or a *Brahmin* practised in the art, as appears from the text:—"It is declared that a *C'shetriya* is to be the

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* *Divyatatwa, Vivádatandava,* and *Vyavahéramayúc'ha.*

† *Pitamaha,* cited in the *Divyatatwa;* but *Náreda* in the *Vivádatandava* and *Vyavahàramayúc'ha.*

‡ *Cátyáyana,* cited in the *Divyatatwa, Vivádatandava,* and *Vyavahàramayúc'ha.*

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archer, or a *Brahmin* practised in that art; a mild, even-minded person, and one who has fasted shall discharge the arrow."*

18. Of the three arrows discharged, the second one should be taken, conformably to the text:—"The law has declared that, of the discharged arrows, the arrow secondly discharged is to be taken by a strong person."† But it must be taken up from the spot on which it alighted, and not from the spot from which it glanced off. "The (place of the) falling of the arrow is to be understood, and (that) of its glancing off is not to be attended to. The glancing is the tortuous bounding of the arrow from distance to distance."‡

The arrow secondly discharged, should be brought from the spot on which it fell.

19. The arrows should not be discharged while the wind blows high, or on an uneven spot of ground, as appears from the text of *Pitamaha*. "A wise man shall not discharge an arrow while the wind blows high, nor on uneven ground, and places impeded by trees or posts, and covered with grass, shrubs, creepers, mud, or stones."§

Places and time improper for the discharge of arrows.

20. The text before cited; "If while the runner is absent, he appears immersed, he should obtain acquittal,"|| demonstrates the guilt of him who raises his body above the surface [before the arrow is brought back]. But *Pitamaha* has

If the person immersed move from the spot, he is considered guilty.

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* *Pitamaha,* cited in the *Divyatatwa,* and *Vyavaháramayúc'ha.*

† *Divyatatwa.*

‡ Ibid.

§ *Divyatatwa, Vivádatandava.*

|| Vide *Supra,* § 8.

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declared him guilty who moves from the spot:—"Under no circumstances should his innocence be admitted, if even a part of his person be visible, or if he move to another place from that into which he first plunged."*

His ears must not be visible.

21. By the mention, "*if even a part of his person be visible*," the parts of his body from his ear downwards are intended, for there is particular mention [of that organ:] "During the time of his being under water, should his head only be seen, but not his ear and nose, in this case his innocence must be admitted."†

Recapitulation of the rules.

22. The following is a recapitulation of the rules for the present ordeal. Having fixed the signal post as before described in the vicinity of a piece of water of the description mentioned; having made a target in a place at the distance specified; having worshipped the bow with the arrows in the vicinity of the signal post; having invoked *Varuna* to enter the water, and having worshipped him; having completed the worship, ending with burnt offerings, of *Dharma* and the other deities; and having bound the written charge on the head of the person who is about to undergo the ordeal, the chief judge should invoke the water with this *formula*, "Thou, O water, art the life of all creatures;" after this the person who is about to undergo the ordeal, having invoked the water with this *formula*, "Preserve me, O *Varuna*, by declaring the truth," should approach the per-

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* *Náreda* and *Vrihaspati*, cited in the *Divyatatwa*; but *Pitamaha* in the *Vyavaháramayúc'ha*.

† *Divyatatwa*; but *Cátyáyana*, cited in the *Vivádatandava* and *Vyavaháramayúc'ha*.

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son standing up to his navel in water and leaning on a pillar; and after three arrows have been discharged, a swift runner going to the spot where the second arrow has alighted, shall take it up, and another one having been stationed at the foot of the signal post, the chief judge should clap his hands thrice, at which instant the running and diving should be simultaneous, and then the fetching the arrow.

Section 5.

Of the Ordeal by Poison.

Form to be observed in this ordeal.

1. He now propounds the rule of the ordeal by poison:— "Thou, O poison, art the son of *Brahmá*, firm in the virtue of truth. Relieve me from this accusation, and by means of thy virtue become as nectar to me."* "Having recited this *formula*, [the accused] should swallow *Saranga* or *Hemasailaja* poison, and if the poison digest, without violent symptoms, it indicates his innocence."†

Explanation of the text.

2. The accused, having invoked the poison with this *formula*, (Thou, O poison, &c., § 1,) shall swallow the poison produced on the Hemalaya mountains, or from the horn of an animal; and if he can digest it, without manifesting any violent symptoms from the poison, he is in that case absolved. By violent symptoms of poison is signified an entire change of the system from its natural state, as a text declares:—"The entire change of the system from its natural state is a violent symptom of poison."‡

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* *Yájnyawalcya*, cited in the *Veeramitrodaya* and *Divyatatwa*.

† Ibid.

‡ *Veeramitrodaya*.

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Description of poisonous symptoms.

3. The corporeal system is composed of seven elements, as skin, blood, flesh, serum, bone, marrow, and semen; and the poisonous symptoms are also seven in number, the appearances of which are distinctly stated in the *Vishatantra*:—" The first violent symptom of poison is horripilation; the second is perspiration and dryness of the mouth; the third and fourth cause the body to change its natural colour and trembling; the fifth prostration of strength, faltering of the voice, and hiccups; the sixth difficulty of respiration, and loss of reason; and the seventh produces the death of the patient."*

Mahadeva to be worshipped.

4. The worship of *Mahadeva* is in this case incumbent, as *Náreda* says:—" Having worshipped *Maheswara* with incense, complimentary gifts, and *muntras*, he should, while fasting, administer the poison in the presence of the gods and *Brahmins*."†

Invocation to be used by the chief judge.

5. The chief judge who has fasted, having worshipped *Mahadeva*, should place the poison before him (*Mahadeva*), and having completed the worship ending with the invocation of *Dharma* and other deities, and burnt offerings, and having placed the written charge on the head of the person who is about to undergo the ordeal, he should invoke the poison thus:—" Thou, O poison, wert produced by *Brahma* for the detection of the evil-minded. Display thy real quality towards sinners, but be as ambrosia to the innocent. Thou, O poison, image of death, wert made by *Brahma*, re-

* *Veeramitrodaya* and *Divyatatwa*.

† *Vivádatandava* and *Divyatatwa*.

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lieve this man from sin and by means of thy virtue become as nectar to him."*

6. Having used this *formula*, the poison should be administered to him [the accused] in a sitting posture, and facing the north, as *Náreda* declares:—"The chief judge, his mind being composed, should, while facing either the north or east quarter, in the presence of *Brahmins*, administer the poison to [the accused] facing the north."† The poison how to be administered.

7. The *Batsanabha* and the like poisons are fit to be administered, as a text of *Pitamaha* declares:—"*Sringi* or *Batsanabha* or *Himaja* poison [should be administered]."‡ What are proper poisons.

8. The other sorts, which are not to be used, have also been propounded by him:—"He should reject poisons which are factitious, decayed, and vegetable."§ *Náreda* also says:—"The *Bhrishta*, *Charita*, *Dhoopita*, *Misrita*, *Calcoota*, and *Alamboo* poisons, should be carefully avoided."|| And what improper.

9. The time of administering the poison is propounded by *Náreda*:—"Having weighed the poison, the quantity of it above indicated, must be administered at a cool season; but one acquainted with the law should not administer it either in the afternoon, or in the twilights, or at noon."¶ Proper time for administering it.

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* *Pitamaha*, cited in the *Veeramitrodaya* and *Vivádatandava*.

† *Veeramitrodaya* and *Divyatatwa*.

‡ Ibid.

§ Ibid.

|| Ibid.

¶ *Veeramitrodaya*.

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Quantity to be administered, varies according to the season.

10. A quantity less than that above stated, should be administered at another time, as a text declares:—"Four barleycorns of poison should be administered in the rainy season, five in the hot season, seven in the cold season, and less than that in the autumn."* "*Less than that,*" means six (barleycorns).

Quantity to be administered in the proper season.

11. By the mention of the cold season, the dewy season is included, owing to their being included in the same compound term in the *Sruti.*† The spring is the time for all ordeals generally; and therefore, at that time also, seven barleycorns of poison mixed with clarified butter should be administered; as a text of *Náreda* declares:—"One-eighth *minus* an eighth of a twentieth of a sixth of a *pala* of the poison should be administered, mixed with clarified butter, to the person who is about to undergo the ordeal."‡

Measures by which the quantity is to be ascertained.

12. One *pala* is equal to four *súvernas;* one-sixth of a *pala* is ten *mashas* and ten barleycorns; three barleycorns make one *krishnala;* five *krishnalas* a *masha;* one *masha* is equal to fifteen barleycorns; ten *mashas* are equal to one hundred and fifty barleycorns; these with the addition of [ten barleycorns] are equal to one hundred and sixty barleycorns, which being one-sixth of a *pala,* one twentieth of it [one-sixth of a *pala*] is eight barleycorns; one-eighth being subtracted from which makes one barleycorn less, which is equal to an eighth of a twentieth of a sixth of a *pala* [or seven barleycorns].—This quantity of poison

* *Veeramitrodaya* and *Divyatatwa.*

† *Divyatatwa.*

‡ *Veeramitrodaya.*

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should be administered, mixed with clarified butter; but the quantity of the clarified butter should be thirty times greater than the poison.

13. *Cátyáyana* declares:—"In the morning and in a cool place, the poison being finely ground and mixed with clarified butter thirty times the quantity, should be given to all persons."* The meaning is, that the poison should be mixed with thirty times as much clarified butter.

Should be mixed with clarified butter.

14. The person about to undergo the ordeal must be guarded from sorcerers and such like persons. "The king should station his own people to guard the person who has undergone the ordeal, from the acts of sorcerers and the like, for the space of either three or five days and nights; and should examine whether he keeps any medicine, *formula*, drugs, or gem, which may serve as antidotes to the poison, concealed about his person."† These are texts of *Pitamaha*.

Care should be taken against the admission of sorcery and antidotes.

15. The poison must also be tried:—"Poisons such as are produced from the horns of animals or from the Himalaya mountains, of superior quality, having smell, colour, and moisture of a known quality, and not removable by charms."‡

Requisite qualities of the poison.

16. After taking the poison a period of time should be observed, during which a man's hands may be clapped toge-

Time allowed for the poison to take effect.

* *Veeramitrodaya* and *Divyatatwa*.

† Ibid.

‡ *Náreda*, cited in the *Veeramitrodaya* and *Divyatatwa*.

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ther five hundred times, after which, a remedy must be applied, as *Náreda* declares:—" If he (the patient) during the time equal to the clapping of hands five hundred times, undergo no change of appearance, he is then absolved, and remedies must be applied."*

Period extended according to one authority.

17. *Pitamaha* extends the period to the end of the day, but this applies to a case where only a small quantity of poison is administered. " After taking the poison, if he be well, free from fainting and vomiting, and unchanged in appearance, then at the end of the day, his innocence must be admitted."†

Recapitulation.

18. Here, the chief judge, having fasted; having worshipped *Mahadeva;* having placed the poison in his presence; having adored *Dharma* and other deities; having placed the written charge on the head of the person who is about to undergo the ordeal, and invoked the poison, shall administer it to him facing the south; and the person who is about to undergo the ordeal, having invoked the poison, must take it. This is the order.—The above is the law of the ordeal by poison.

Section 6.

Of the Ordeal by sacred Libation.

Form to be observed in this ordeal.

1. He next propounds the ordeal by sacred libation:— " Having adored the wrathful gods, he should take the

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* *Veeramitrodaya* and *Divyatatwa.*

† *Veeramitrodaya.*

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water in which they have been bathed, and having invoked it, he should cause to drink three handfulls of the same water."*

Explanation of the text.

2. "*Having adored,*" having worshipped with perfumes, flowers, and the like; "*the wrathful gods,*" *Doorga, Aditya,* and other deities: having washed them, the water in which they have been bathed should be collected. After bringing [the water], the chief judge should thus address it, "Thou, O water, art the life of all mortals;"† and should cause the person who is about to undergo the ordeal, to drink three handfulls of it; he having placed the water in another vessel, and invoking it thus, "O *Varuna,* by means of thy truth, preserve me."‡

Ceremonies prescribed for other ordeals, to be observed in this.

3. This is to be done after the ceremonies prescribed for all ordeals, such as the invocation of *Dharma* and other deities, worship, and burnt offerings, and the placing of the written charge on the head with the prescribed *formula.*

The worship of particular deities, prescribed for certain individuals.

4. Here, by *Pitamaha* and others, have been propounded the rules relative to the deities proper for bathing, the fit occasions, and the persons who are competent to perform the rites:—"He should cause him to drink the water of that deity to whom he may be particularly devoted, and in case the individual worships all the deities equally, he must drink the water in which *Surya* or the sun has been bathed.

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* *Yájnyawalcya,* cited in the *Smritichandricá,* and *Veeramitrodaya;* but *Vishnu* in the *Vivádatandava.*

† Vide *Supra.*

‡ Ibid.

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Thieves and persons who live by the profession of arms should be made to drink the water in which *Doorga* has been bathed, but in no case should a *Brahmin* be made to drink [the water] in which *B'hascara* or the sun has been bathed. The spear of *Doorga* and the disc *(Mandala)* of *Aditya* or the sun must be washed; so the weapons of the other deities."*—This is the rule with respect to the deities.

Cases in which, and persons by whom, this ordeal should be used.

5. "The sacred libation must always be given in a case of confidence, and in cases of suspicion in general, and also for the purpose of reconciliation in order to produce mental satisfaction. The sacred libation is ordained to be used in the morning, by a person fasting, having bathed, clothed in moist garments, by a religious person, and one not addicted to evil practices."† "*A religious person*" signifies, one who believes in the existence of the Supreme Being.

Persons to whom this ordeal should not be administered.

6. "No wise man should administer the sacred libation to a drunkard, or a fornicator, to one addicted to evil practices, to a fraudulent person, and one professing atheism. He should avoid giving the sacred libation to a heinous offender, to one irreligious, ungrateful, to one impotent, lowborn, or atheistical, to one of whom the customary sacraments have been omitted, and who has not received investiture with the sacred thread, and to slaves."‡

Explanation of the disqualifying terms.

7. "*A heinous offender*," [one who has committed] a crime of the first degree; "*irreligious*," destitute of the re-

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* *Smritichandricá*, *Vivádatandava*, *Veeramitrodaya* and *Divyatatwa*.

† Cited by *Ballambhatta*.

‡ *Nárada*, cited in the *Divyatatwa*.

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ligion of his class or order, and a heretic; "*lowborn*" born in the reverse order of the tribes; "*slaves*" includes fishermen or the like.—This is the rule relative to persons incompetent.

8. And it must be understood by the text of *Náreda*, that [the chief judge], having made a circle with cow-dung, and placed the person who is about to undergo the ordeal, facing the east, within that circle, should administer to him the sacred libation. His text is to the following effect:—"Having brought the accused, he should place him inside the circle, and administer to him three handfulls of water, facing the east."* — Duty of the chief judge.

9. But [should it be objected], that admitting the establishment of guilt and innocence at the completion of the other ordeals, beginning with the balance and ending with the poison, such effect cannot result from the ordeal by sacred libation; it is replied:—"He is doubtless innocent to whom no terrible calamity, proceeding from the act of God or the king, happens within fourteen days."† He to whom, prior to the expiration of fourteen days, no calamity or terrible distress proceeding from the king or the act of God, that is, having superhuman origin, happens or befalls, and he to whom only a slight distress occurs, should be considered as innocent; for cases of slight distress are incident to all mortals. — The innocence of the accused is proved, if no calamity befall him within fourteen days.

10. Guilt is not imputable if the calamity occur after the prescribed period, as *Náreda* says:—"One to whom any — Calamity happening after that period is no evidence of guilt.

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* *Náreda*, cited in the *Vivádatandava* and *Divyatatwa*.

† *Yájnyawalcya*, cited in the *Vivádatandava*.

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great deterioration happens at the end of two weeks, the wise should not consider as convicted; owing to the expiration of the prescribed period."*

In trifling cases the period allowed is less.

11. The text "*within fourteen days*," applies to weighty charges, as has been specifically declared in the text:—"These must be administered in cases of weighty charges."† Other periods are propounded by *Pitamaha* in trifling cases:—"In a trifling case, the sacred libation is to be administered." The periods are these:—"Of whomsoever any deterioration appears, during either three or seven nights, or twelve days or two weeks, he must be held to be a criminal."‡

And varies as the charge is more or less trifling.

12. The subject-matter which does not constitute a heavy charge, may be divided into three kinds, and the rule regarding the three periods, [namely, three nights, seven nights, and twelve days,] may be applied to each kind of case severally.—Thus (has been declared) the law of the ordeal by sacred libation.

Section 7.

Of the Ordeal by Grains of Rice.

1. *Jogeswara* has propounded the five great ordeals, from the balance to the sacred libation inclusive, as indicated; but other ordeals in trifling charges have been declared

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* *Vivádatandava*, *Veeramitrodaya*, and *Divyatatwa*.

† *Divyatatwa*.

‡ *Smritichandricá*, *Vivádatandava*, and *Veeramitrodaya*; but *Yájnyawalcya*, cited in the *Divyatatwa*.

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in other *Smritis; Pitamaha* has declared:—"I will propound the mode of using the ordeal by husked rice as ordained. In the case of theft the [ordeal of] husked rice is to be administered, and not in other cases; this is certain. 2. He should cause white rice to be used, and of the *Shalee** description, but not of any other kind. A purified person having mixed the same with water, in which [an image of the sun] has been bathed, in an earthen vessel exposed to the rays of the sun, should leave it on the same spot all the night. He [the chief judge] must cause the person, standing with his face to the east, having fasted and bathed, and taken the written charge on his head, to chew the rice and to spit it out on a leaf. The leaf must be of the fig-tree,† and not of any other; but if none be procurable, of the *Bhoorjapatra*.‡ 3. If the chewed rice be tinged with blood, and the jaws and palate [of the accused] become dry, and his body tremble, consider him guilty."§ Let the chief judge, having caused the person who has taken the written charge on his head, to chew the rice and to spit it out. Having caused to chew [*bhukéshyitwa*] is the active participle formed by the causal affix *nichi*. In this instance, the invocation of *Dharma* and the ceremonies are to be observed, in the manner already prescribed; such being the general rule applicable to all ordeals.

Should be administered in cases of theft.

Ceremonies to be observed on the occasion.

Proof of guilt.

All the ceremonies prescribed for other ordeals to be observed in this.

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* *Shalee.*—Rice in general, but especially in two classes, one like white rice growing in deep water, and the other a red sort requiring only a moist soil.—*Wilson's Dict.*

† *Pippala, Ficus religiosa.*

‡ The *Bhoj* or *Bhojputr*, a tree growing in the snowy mountains, and called by travellers a kind of birch.—*Wilson's Dict.*

§ *Smritichandricá, Vivádatandava, Veeramitrodaya*, and *Divyatatwa.*

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SECTION 8.

Of the Ordeal by hot Metal.

Form to be observed in this ordeal.

1. The ordeal by hot metal has been propounded by *Pitamaha.* "A round cup of either gold, silver, copper, or earth, is to be made, sixteen fingers [in circumference] and four in depth."* The term "round cup" *(mandala)* here means a circular pan. "It is to be filled up with twenty *palas* of clarified butter and oil; and one *masha* of gold is to be thrown in when it is heated sufficiently; and he [the accused] should take out the gold by the thumb and fore-finger joined. He whose hand trembles not, and does not become blistered, and whose fingers sustain no detriment, becomes absolved by means of his virtue."†

Proof of innocence.

Explanation.

2. In the text, the term "should take out" means, should lift out of the vessel only, and it is not necessary to be thrown over the side.

Another mode of performing this ordeal.

3. Another mode is:—"Having put clarified butter, made of cow's milk, into a vessel formed either of gold, silver, copper, iron, or earth, a purified person should heat it in the fire. A piece of metal, either gold, silver, copper, or iron, properly cleaned and washed once with it, is to be thrown in it [the clarified butter], boiling with effervescence, and not admitting the touch of the nail. It [the clarified butter] should be examined by throwing into it the leaf of the

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* The text is read otherwise by the authors of the *Smritichandrica, Vivádatandava, Veeramitrodaya,* and *Divyatatwa.*

† Ibid.

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*Arca** tree, being purified as for sacrifice, and having a hissing sound; afterwards he should once consecrate it with this *Muntra* or *formula*:—' Thou, O clarified butter, art most pure for sacrificial observances. Thou, O fire, certainly burnest sinners, and waxest cold in favour of the innocent.' He should cause him [the accused], having come fasting, bathed, and with moist clothes, to take out the metal, which was left in the clarified butter. The examiners should inspect his fore-finger; and if there be no blisters on it, he is innocent, but if otherwise, guilty."†

4. Here also the rule regarding the invocation of *Dharma*, and the like ceremonies, must be attended to. The above incantation to the clarified butter is to be used by the chief judge. All the ceremonies used in other ordeals to be observed in this.

5. " Thou, O purifying fire, dwellest in the interior of all creatures."‡ This *formula* is to be used by the person about to undergo the ordeal. *Formula* to be used by the party.

6. From the text " should inspect the fore-finger" it follows, that it is that finger by which the metal should be taken out.—Thus has been succinctly propounded the ordeal by hot metal. Explanation of a former text.

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* *Arca* is commonly called *Acanda*: *Calotropis gigantea.*

† *Smritichandricá*, *Veeramitrodaya*, and *Divyatatwa.*

‡ Vide *Supra.*

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Section 9.

Of the Ordeal by Dharma and Adharma.

This ordeal applicable to what cases.

1. By *Pitamaha* has been declared the rule regarding the ordeal named *Dharma* and *Adharma** :—" I will now clearly propound the trial by *Dharma* and *Adharma,* [which is intended for] murderers, civil suitors, and persons subject to the performance of penance."†

Explanation of the text.

2. " *Murderers,*" in cases involving life; " *civil suitors,*" in cases involving property; " *persons subject to the performance of penance,*" in cases involving moral sin.

Form to be observed in this ordeal.

3. " An image of *Dharma* is to be made with silver, and another of *Adharma* with lead or iron." The meaning is, that this image may be made either of lead or iron.

Another mode of performing this ordeal.

4. He declares another mode :—" Or he may draw white and black figures of *Dharma* and *Adharma,* either on a leaf of the *Bhoj* tree, or on canvas, cloth, &c. He should sprinkle the *Panchagavya*§ on them, and should make offerings of perfumes and garlands. *Dharma* will hold a white flower in his hand, and *Adharma* a black one. Having made two pictures as above described, he should enclose them in two round balls. Two balls equal in size are to be made either

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* These terms may be translated the genius of justice and of injustice.

† *Smritichandricá, Veeramitrodaya,* and *Divyatatwa.*

‡ *Pitamaha,* cited in the *Smritichandricá, Veeramitrodaya,* and *Divyatatwa.*

§ This is used for purification, and made with sugar, clarified butter, honey, cow-dung, and cow-urine.

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with cow-dung or earth, and placed unobserved in a fresh earthen vessel. Having placed the vessel on a spot cleaned and rubbed with cow-dung, and in the presence of the gods and *Brahmins;* he should invoke the gods and regents of the world in the manner above prescribed."*

Formula to be recited by the accused.

5. He should draw out the written charge after the invocation of *Dharma:* then the accused should recite this *formula:*—"If I am free from guilt, may *Dharma* come into my hand; if I am guilty, then by means of its virtue, may Sin† come into my hand."‡

Proof of guilt or innocence.

6. "The accused without delay shall then take out one of the images; he is acquitted if he bring out the image of *Dharma;* but condemned if he draw forth that of *Adharma.*"§—Thus has been succinctly declared the trial by *Dharma* and *Adharma.*

SECTION 10.

Of other Tests.

Enumeration of other tests for the ascertainment of guilt or innocence.

1. Moreover, other tests with reference to the importance and lightness of the subject-matter, as well as to the distinction of the tribes, have been declared by *Menu* and others. Those are:—"The oath should be taken, by truth in the case of one *Niska:* by touching the feet [of a superior] in that

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* *Pitamaha,* cited in the *Smritichandricá, Veeramitrodaya,* and *Divyatatwa.*

† *Sin* here means the image of *Adharma.*

‡ *Pitamaha,* cited in the *Smritichandricá, Veeramitrodaya,* and *Divyatatwa.*

§ Ibid.

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of two *Niskas*, and by [the forfeiture of the fruit of] virtuous acts in the case of three, and by the sacred libation in cases exceeding that amount."* "Let the judge cause a priest to swear by his veracity; a soldier, by his horse or elephant, and his weapons; a merchant by his kine, grain, and gold; a mechanic or servile man, *by imprecating on his own head, if he speak falsely,* all possible crimes."†

Mode of ascertaining innocence.

2. The mode of ascertaining innocence is propounded by *Menu*:—"One who meets with no speedy misfortune, must be held veracious in his testimony on oath."‡ The calamity is thus described. "Of whom no dreadful calamity befalls from God or the king."§

Time to be allowed.

3. The extent of the period [allowed for the appearance of the calamity], varies from the first night to the third, from the third night to the fifth, and so forth, and should be fixed with reference to the serious or trifling nature of the charge.

Losing party to be subjected to fine and penalty.

4. The result, whether successful or otherwise, of these ordeals, being determined, a distinction as to the punishment is shown by *Cátyáyana*:—"He should cause to be paid [by the losing] to the successful party half of an hundred, and the condemned is subject to a penalty."||

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* *Vivádatandava.*

† *Menu*, 8, § 113, cited in the *Vivádatandava*, *Veeramitrodaya*, and *Divyatatwa.*

‡ *Vivádatandava*, *Veeramitrodaya*, *Menu*, 8, § 115.

§ Vide *Supra.*

|| *Vivádatandava.*

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5. The penalty is thus propounded :—" The penalty in the ordeal by poison, water, fire, balance, sacred libation, rice, hot metal, should be awarded consecutively ; thus one thousand, six hundred, five hundred, four, three, two, and one hundred, and in inferior ordeals he should attach an inferior [penalty."]

Amount of fine.

6. This peculiar penalty for cases of ordeal is to be superadded to the penalty before denounced by the text, (" In the case of a denial, when the claimant proves his allegation, the defendant being cast, is to pay the amount, and an equal fine to the king.")†

Is to be superadded to the penalty formerly denounced.

* *Cátyáyana*, cited in the *Vivádatandava*.

† Vide *Supra*, Cap. ii, Sect. 3, § 1.

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INDEX.

A

Page.

Acquirer, ... 52,220

Acquisition, ... 285,306

Adityas, ... 302

Adharma, ... 340

Adjuration,

mode of adjuring the several orders, ... 248

exception in case of certain *Brahmins*, *Cshetryas*, and *Vaisyas*, ... *ib.*

case of witnesses being challenged, ... *ib.*

form of adjuration to be used towards the servile class, and to the regenerate orders following mean occupations, ... 249

the adjuration not to be understood literally, ... 250

Administration of justice, ... 133

Admonition, ... 250

Adopted son, ... 70

Adoption, ... 63,76

what forms at present allowed, ... 65

Dattaca form, ... *ib.*

Critrima form, ... *ib.*

a widow, if in distress, may give her son in adoption,... 66

and may adopt with sanction of her late husband, ... *ib.*

qualifications of the adopting party, ... *ib.*

of the adopted party, ... 67

exception in case of a *Sudra*, ... *ib.*

widow may adopt with sanction of kindred, ... 68

brother's son should be preferred, ... *ib.*

this rule does not invalidate the adoption of a stranger, *ib.*

must be initiated in the adopter's family, ... 69

effect of adoption, ... *ib.*

Digitized by Google

Page.

Adoption, his consanguineous relatives are not his heirs, ... 69
exception in case of a *Dwyamushayuna*, ... 70
share of adopted son with a son or more sons subsequently born, ... ib.
has all the rights of a posthumous son, ... ib.
age of, ... 72
periods of, ... 73
cannot take place after investiture, but may after tonsure under five years, ... 75
among the Mahrattas no restriction as to age of a relation, ... ib.
nor in the *Critrima* form ... ... ib.
a man having a son and a son's son, may give the former in adoption, ... 77
two persons cannot adopt the same individual under any circumstances, ... ib.
a man having a son or an adopted son may authorize his wife to adopt another, failing such son, ... 84
but whether she can without such sanction, is disputed, 87
of the *Critrima* form, ... 98
of the *Crita* son, ... 101
of the *Paunerbhava*, ... ib.
of the *Cshetraja*, ... 102
other forms obsolete, ... ib.
Affirmation, ... 285
Age of adoption, ... 72
Alienation, ... 3
Amercement, ... 224
Brahmins may be amerced, ... 141
Ancestor, ... 111,215
Ancestral property cannot be alienated at pleasure, ... 14
Anitya Dwyamushayuna, ... 71
Answer, ... 154
must not be taken before the declaration has been amended, ... ib.
to be written, ... ib.
explanation, ... 155
requisites of an, ... ib.
further explanation, ... ib.
four kinds of, ... 15[illegible]

Digitized by Google

Page.

Answer, nature of confession, ... 156
nature of denial, ... *ib.*
denial is four-fold, ... *ib.*
semblance of an answer, ... 159
a confession is a good answer, ... 163
distinction between an exculpatory negation and a simple denial, ... *ib.*
Appeal, ... 223
some cases appealable, others not, ... *ib.*
relative rank of tribunals propounded, ... *ib.*
exposition of the text, ... *ib.*
an appeal may be preferred from the decision of a family upwards to persons specially appointed by the ruler, ... 224
an appeal may be preferred to the king. If affirmed, appellant to be amerced; if reversed, judicial authorities to be amerced, ... *ib.*
Appellant, ... *ib.*
Arca tree, ... 312
Archer, ... 324
Argument, ... 75
against unequal partition, ... 45
Arrest, ... 146
four-fold, ... *ib.*
of breaking, ... *ib.*
improper, ... *ib.*
exemptions from, ... *ib.*
meaning of the term 147
Arrows, ... 323,324,325
Assessors, ... 135,184
appointment of, ... 135
should belong to the Brahminical tribe, ... 136
number of, ... *ib.*
are distinct from the first mentioned *Brahmins*, ... *ib.*
duty of, ... 137

B

Balance (ordeal by), ... 298,300
Benares, ... 22,32,44,91

Digitized by Google

Page.

Bengal, ... 43,44,47,90
Bow, ... 323,324
Brahmin, ... 210,248
Branding, ... 211
Brother, ... 26,49,76
's son, ... 27,68
grandson, ... 28

C

Challenge,
a false challenge punishable, ... 249
Charges,
are two-fold, presumptive and positive, ... 142
positive charges are two-fold, for commission or omission, ... *ib.*
what is termed a heavy charge, ... 295
objection replied to, ... *ib.*
Chief Judge, ... 305,307,314,320,328,335
supremacy of the chief judge, ... 139
etymological derivation of the term, ... *ib.*
Civil Action,
difference in the case of a civil action from a criminal prosecution, ... 171
distinction in civil and criminal cases, ... 296
Claims, ... 171,175
diversity of, ... 143
conflicting 180
Cognates, ... 78,79
Complaint,
should be made voluntarily, ... 143
there may be many complaints against one, ... 144
reasons for a second record of the, ... 148
difference between the first complaint and the declaration, ... 149
Complainant,
to be interrogated previous to summons being issued, ... 144
the term plaintiff or complainant includes their sons, grandsons, and agents, ... 15[illegible]

Digitized by Google

Page.
Condition of partition, ... 43
of slavery, ... 114
Confession, ... 165
Consent, ... 43,76
Contracts, ... 121,270
what contracts are binding on representatives ... 127
Contradiction, ... 243
Coverture, ... 104,122
Counsellors, duty of, ... 137
Credibility,
must be inquired into, after the question of competency has been disposed of, ... 255
another objection replied to, ... 256
Criminal prosecution, ... 171,172
Crita son, ... *ib.*
the *Goswamis* adopt in the *Crita* form, ... *ib.*
Critrima, form of adoption, ... 65,75,98
according to which form a brother or a father may be adopted, ... 76
he does not lose relation to his natural family, but inherits in both, ... *ib.*
adopted by a widow, does not thereby become son of the husband, ... *ib.*
must himself consent to the adoption, ... *ib.*
relation does not descend, ... *ib.*
does not inherit collaterally, ... 77
reason of its prevalence in *Mithila,* 100
sanction of the husband not requisite in this form of adoption, ... *ib.*
the husband may have one *Critrima* son and the wife another, ... 101
Cshetraja, ... 102
Cshetrya, ... 248

D

Dharma, ... 340
Dattacachandricá, ... 72,74
Dattacamimánsá, ... *ib.*
Dattaca, form of adoption, ... 65

Digitized by Google

Page.
Dattaca, son succeeds collaterally, but not to the property of cognates, ... 78
Daughter, ... 21,22,50
's son, ... 23
Dáyacramasangraha, ... 29
Decision, ... 224
a decision founded on inference being erroneous, no blame attaches, ... 186
liable to reversal, ... 225
the decision rests on the evidence of the witnesses adduced, ... 253
except where the witnesses do not recollect, ... *ib.*
Debt, ... 111
a bonded debt claimable from the son and grandson of the obligor, ... 274
objection answered, ... *ib.*
the text has been recited to exonerate the fourth in descent, ... 275
case in which the fourth and others in descent may adjust the debt, ... *ib.*
mode of proceeding where the debtor is unable to discharge the whole debt at once, ... 280
what is to be done after discharge of the debt, ... 281
those who witnessed the loan should witness repayment also, ... *ib.*
Debtor, ... 280
Declaration,
method of recording the, ... 147
what to contain, ... 148
further particulars to be comprised in the, ... 149
difference between the first complaint and the, ... *ib.*
semblance of, ... 151
a declaration is admissible, though involving many matters, ... 152
corrections may be made until the answer is given in, ... 154
Decree, a favourable, ... 277
an unfavourable, ... 278
Defendant, ... 175
Deliberation, ... 167

Digitized by Google

Page.
Delinquency, ... 243
Denial, ... 163
Deposit, ... 208
Deposition, mode of taking, ... 247
Deputy, sick and other exempted persons may appear
by, ... 147
Distress, ... 66
Distribution, unequal, ... 6
Divine test, ... 196,283,286
Doctrine of *factum valet*, ... 4
of wills, &c. 6
Document, what is termed an official, ... 277
mode of clearing up doubt from a contested, ... 279
Doorga, ... 304
Dwyamushayuna, ... 70
form of adoption, ... 71
Nitya, form ... ... *ib.*
Anitya, ... *ib.*
His share with a son subsequently born, ... *ib.*

E

Emancipation, ... 118
Error, ... 123
fatal to a criminal prosecution, though not to a civil suit, 172
Ethical code, ... 189,193
Evidence, of partition, ... 53
on delivery of the answer, evidence shall instantly
be adduced, ... 164
in a case of confession, no evidence requisite... ... 165
four sorts of, ... 195
further division of, ... *ib.*
objection against evidence of possession replied to, 196
in default of other evidence, a divine test to be
resorted to, ... *ib.*
human evidence is preferable to a divine test, ... 197
the principal part of a claim being proved by human
evidence, recourse should not be had to a divine
test, ... *ib.*
the same rule declared by *Cátyáyana*, ... 198

Digitized by Google

Page.

Evidence, divine test to be resorted to, only in default of human evidence, ... 198
exception, ... ib.
a title is stronger evidence than mere recent possession, 212
simple possession is no evidence, ... ib.
possession is evidence, when accompanied by five conditions, ... ib.
also when accompanied by hereditary succession, ... 213
it affords presumption of a title, ... ib.
a title is evidence in cases within the memory of man, but beyond such memory possession is sufficient, ... 213
text of *Cátyáyana* cited in confirmation, ... ib.
one hundred years defined to be a period within the memory of man, ... 214
possession with an inferrible title is evidence of right, ... 216
false evidence being detected, the judgment is to be reversed, ... 252
mode of proceeding when the evidence is contradictory, ... ib.
what further means of proof may be resorted to, by a claimant not content with his evidence, ... 256
Expiation, ... 265,267

F

Factum valet, ... 4
Falsehood, ... 178
Family, ... 69,78
undivided, ... 22
Father, ... 39,43,76,103,227
Finder, ... 222
Fine, ... 180,209
Force, ... 123
Fraud, ... 124

G

Gayatri, ... 305
Gift, ... [illegible]
Goswamis, ... 101

Digitized by Google

Page.
Grains of rice, ... 337
Guardian, ... 103,105
the ruling power is the supreme guardian of all minors, 104
Guardianship, of the father, ... 103
of the mother, ... ib.
of parental relations, ... 104
of maternal relations, ... ib.
their appointment vested in the ruling power, ib.
of a female, ... ib.
Guardianship, during coverture, ... 104
in widowhood, ... ib.
Gunes, ... 303

H

Heirs, according to the *Dáyacramasangraha*, ... 29
according to *Sricrishna*, ... 30
according to other authorities, ... 31
Hidden treasure, ... 233
Hot metal, (ordeal by) 338
Human evidence, ... 197,198
Husband, ... 76,100,101,227

I

Idiot, ... 208
Ignorance, ... 187
Incapacity, ... 125
Incompetency, ... 124
Inheritance, ... 2
Insanity, ... 121
Investiture, ... 73,75
Invocation, ... 299,307,313,314,320,328

J

Judgment must be given after adducement of evidence, ... 165
what judgment to be given against defendant being cast, ... 175
what judgment to be given against a plaintiff failing to establish his claim, ... ib.

Page.

Judicial authorities, ... 224
proceeding, general definition of, ... 134
subject of a judicial proceeding defined, ... 141
subjects of judicial proceedings are eighteen-fold, ... 142
quadruple division of a, ... 166
judicial deliberation, not a distinct division of the proceedings, ... 167
Jugunnatha, ... 43,47,89

K

King, ... 224,233
judicial duty of, ... 133
responsibility of the, ... 134
may appoint a representative, ... 138

L

Lesion, ... 122
Liability, ... 107
Limitation, ... 233
Loan, ... 281

M

Mahadeva, ... 328
Mahrattas, ... 75
Majority, ... 111
Marriage, ... 57
Marutas, ... 303
Master, ... 227
Maternal relations, ... 104
Matris, ... 303
Minor, ... 104
question as to the liability of a minor and his estate during his minority, ... 107
minor heir and his estate are not liable for the debt of his ancestor until his majority, ... 111
Minority, ... 103,107
Mithila, ... 22,95

Page.
Mortgage, ... 200
Mother, ... 25,50
's guardianship, ... 103

N

Negation, ... 163,285
Nephew, right of, ... 50
Nitya Dwyamushayuna, ... 71
Nonsuit, ... 180
causes of, ... 148
does not invalidate the claim, ... 171

O

Oath, ... 287
Obligation, ... 266
causes of dissolving, ... 121
insanity, ... *ib.*
minority, ... 122
coverture, ... *ib.*
lesion, ... *ib.*
error, ... 123
force, ... *ib.*
fraud, ... 124
incompetency, ... *ib.*
incapacity, ... 125
revocation, ... 126
Obligor, ... 271,274
Official document, ... 277
Omission, ... 142
Ordeal,
five principal methods of ordeal, ... 283
there are altogether seven methods of ordeal, ... *ib.*
scales and the other four methods of ordeal to be used in certain cases, ... 284
an ordeal may be resorted to, in proof of a negation, as well as of an affirmation, ... 285
different ordeals applicable to different accusations, ... *ib.*
other divine tests described, ... 286

Digitized by Google

Page.
Ordeal, distinction between an oath and an ordeal, ... 287
and between different kinds of ordeal, ... 288
ceremonies to be observed with respect to ordeals in general, ... 289
different times propounded for different ordeals, ... 290
particular seasons enjoined for particular ordeals, ... *ib.*
particular seasons prohibited, ... 291
ordeals for particular persons, ... *ib.*
Ordeal by balance,
mode of proceeding with respect to, ... 298
interpretation of the text, ... *ib.*
invocation to be used by the party undergoing the ordeal, 299
tree to be cut down with certain ceremonies, ... *ib.*
method of constructing the balance, ... 300
method of weighing, ... *ib.*
forms and ceremonies to be observed on the occasion, ... 301
worship of the regents of the world, ... 302
of the *Vasus*, &c., ... *ib.*
offerings to be presented, ... 304
mode in which the worship is to be performed, ... *ib.*
qualifications of the officiating chief judge, ... 305
the *Gayatri* to be repeated, ... *ib.*
the accusation should then be written with a *muntra*, and placed on the head of the accused, ... 306
the above ceremonies applicable to all ordeals, ... 307
invocation by the chief judge, ... *ib.*
the person about to undergo the ordeal should also invoke before being weighed, ... *ib.*
period of weighing, ... 308
what persons should be appointed to decide as to the question of guilt or innocence, ... *ib.*
rule for ascertaining the point, ... 309
exception, ... *ib.*
explanation of the exception, ... *ib.*
other evidence of guilt, ... *ib.*
explanation of the terms, ... *ib.*
distinction, ... 310
fees to be paid to the officiating priests, ... *ib.*
precaution to be adopted when the scales are required for future use, ... *ib.*

Digitized by Google

Page.

Ordeal by *Dharma* and *Adharma*,
this ordeal applicable to what cases, ... 340
explanation of the text, ... *ib.*
form to be observed in this ordeal, ... *ib.*
another mode of performing this ordeal, ... *ib.*
formula to be recited by the accused, ... 341
proof of guilt or innocence, ... *ib.*
Ordeal by fire,
forms to be observed in this ordeal, ... 311
explanation of the text, ... *ib.*
other ceremonies to be observed, ... *ib.*
Arca leaves to be used only when the *Pippala* leaves are not procurable, ... 312
invocation to be used by the party undergoing the ordeal, *ib.*
position of the accused, ... 313
explanation of the text, ... *ib.*
ceremonies to be performed by the chief judge, ... 314
invocation to be used by the chief judge, ... *ib.*
dimension and description of the redhot ball with which the ordeal is to be performed, ... 315
the accused is to walk through seven circles,... ... *ib.*
extent of the circles,... 316
explanation of the text, ... *ib.*
small circles are to be made within the larger ones, ... 317
enumeration of the circles according to the text of *Pitamaha*, ... *ib.*
enumeration of the terms of measurement, ... 318
if the hand is burnt, he is criminal, ... *ib.*
but not, if he is burnt elsewhere,... ... ... *ib.*
recapitulation of the ceremony, ... 319
Ordeal by grains of rice,
should be administered in cases of theft, ... 337
ceremonies to be observed on the occasion, ... *ib.*
proof of guilt,... ... ... *ib.*
all the ceremonies prescribed for other ordeals, to be observed in this, ... *ib.*
Ordeal by hot metal,
form to be observed in this ordeal, ... 338
proof of innocence, ... *ib.*
explanation, ... *ib.*

Digitized by Google

	Page.
Ordeal by hot metal,	
another mode of performing this ordeal,...	338
all the ceremonies used in other ordeals, to be observed in this, ...	339
formula to be used by the party, ...	ib.
explanation of the former text, ...	ib.
Ordeal by poison,	
form to be observed in this ordeal, ...	327
explanation of the text, ...	ib.
description of poisonous symptoms, ...	328
Mahadeva to be worshipped, ...	ib.
invocation to be used by the chief judge, ...	ib.
the poison how to be administered.	329
what are proper poisons, ...	ib.
proper time for administering it, ...	ib.
quantity to be administered, varies according to the season,	330
quantity to be administered in the proper season, ...	ib.
measures by which the quantity is to be ascertained, ...	ib.
should be mixed with clarified butter, ...	331
care should be taken against the admission of sorcery and antidotes, ...	ib.
requisite qualities of the poison, ...	ib.
time allowed for the poison to take effect, ...	ib.
period extended according to one authority, ...	332
recapitulation, ...	ib.
Ordeal by sacred libation,	
form to be observed in this ordeal, ...	332
explanation of the text, ...	333
ceremonies prescribed for other ordeals, to be observed in this, ...	ib.
the worship of particular deities, prescribed for certain individuals, ...	ib.
cases in which, and persons by whom, this ordeal should be used, ...	334
persons to whom this ordeal should not be administered,	ib.
explanation of the disqualifying terms, ...	ib.
duty of the chief judge, ...	335
the innocence of the accused is proved, if no calamity befall him within fourteen days, ...	ib.
calamity happening after that period is no evidence of guilt, ...	ib.

Digitized by Google

Page.

Ordeal by sacred libation,
in trifling cases the period allowed is less, ... 336
and varies as the charge is more or less trifling, ... *ib.*
Ordeal by water,
forms to be observed in this ordeal, ... 319
explanation of the text, ... 320
Varuna must be worshipped, after the other prescribed ceremonies have been gone through, ... *ib.*
invocation to be used by the chief judge, ... *ib.*
and by the accused, ... *ib.*
enumeratien of the different descriptions of water fit for the ordeal, ... 321
meaning of the term reservoir, ... *ib.*
the person who stands in the water should hold a pillar, *ib.*
mode of ascertaining innocence, ... 322
explanation, ... *ib.*
another mode described, ... *ib.*
as declared by *Pitamaha*, ... *ib.*
what constitutes a swift runner, ... 323
description of the signal post, ... *ib.*
bow and arrows to be worshipped, ... *ib.*
dimensions of the bow, and distance of the target, ... 324
arrows how to be made, ... *ib.*
who should be archer, ... *ib.*
the arrow secondly discharged should be brought from the spot on which it fell, ... 325
places and times improper for the discharge of arrows, *ib.*
if the person immersed move from the spot, he is considered guilty, ... *ib.*
his ears must not be visible, ... 326
recapitulation of the rules, ... *ib.*
Order of succession, ... 32,34
Origin of slavery, ... 114

P

Paternal relations, guardianship of, ... 104
Partition, ... 43,45
of ancestral estate, demandable by sons according to the law of Benares, ... 44

Digitized by Google

Page.

Partition, how to be made by the father according to the laws of Bengal and Benares, ... 44
argument against unequal partition, ... 45
right of a son born after, ... 47
when to be made by brethren, ... 49
property not subject to, ... 53
evidence of, ... ib.

Paunerbhava, ... 101

Pauper, ... 210

Penalty,
incurred only where the wrong is wilful, ... 140
of usurpation in cases of pledge, and other instances, 209
cases in which the fine need not be equivalent to the property usurped, ... ib.
to be inflicted on an offending pauper, ... 210
for refusal to give evidence after admonition, ... 250
for refusing to bear testimony, ... 251
of suborners and false witnesses, ... 260
special rules in certain cases, ... ib.
explanation of the terms in the text of *Menu*, ... 261
for concealing evidence, ... 263

Penance, ... 193

Periods of investiture, ... 73
of adoption, ...73, 74
of keeping trove property in deposit, ... 232

Perjury, ... 261

Personal property, ... 115

Pippala leaves, ... 312

Plaintiff, ... 162, 165 175

Plea,
nature of a special plea, ... 150
of former judgment, ... ib.
confusion of pleas inadmissible, ... ib.
case of a denial and special exception, ... ib.
case of a former judgment and special exception, ... 160
case of an answer involving three or four pleas, ... ib.
must be taken separately, ... ib.
the most weighty plea should be first examined, ... 161
confession to be acted on after all other pleas, ... ib.

Digitized by Google

Page.
Plea, the term "most important plea," means that which is followed by most proceedings, ... 161
in a case of special plea and a plea of former judgment, defendant may select his own, ... 164
both parties not to plead at once, ... ib.
recriminatory plea permitted, when exculpatory, ... 169
of ignorance, ... 187
Pledge, ... 209
Plundered property, ... 236
Poison, ... 327, 329, 331
Poisonous symptoms, ... 328
Positive charge, ... 142
Possession, ... 199, 212, 216
effect of, ... 201
explanation, ... ib.
objection urged to this interpretation, ... ib.
additional reasons for the objection, ... 202
argument continued, ... ib.
continuation of the argument. The text does not imply loss of remedy, ... 203
continuation of the argument, ... 204
other constructions proposed and rejected, ... ib.
right interpretation of the text propounded. Loss of profits intended, ... 205
must be for twenty years observed, and uninterrupted, ib
where the profits are forthcoming, they are to be restored, ... 206
punishment may be inflicted on the unlawful possessor, even after twenty years, ... ib.
recapitulation, ... ib.
exception, ... 207
explanation of the terms in the exception, ... ib.
neglect not productive of loss of profits in mortgage, &c., ... 208
nor in the case of boundaries, or sealed and specified deposits, ... ib.
nor in the case of idiots and other exempted persons, ib.
recapitulation, ... ib.
unauthorized possession even in the second and third generation punishable under certain conditions, ... 214

Digitized by Google

Page.

Possession, by three ancestors, not sufficient evidence without length of time, ... 215
Posterior act, ... 199
Power of guardians over the property of their wards, ... 105
Presumptive charge, ... 142
Priority,
  the posterior act is of most effect in certain cases, ... 199
  explanation : example, ... ib.
  additional example, ... 200
  exception in cases of mortgage, gift, and sale, ... ib.
  objection answered, ... ib.
Proof, ... 288
  in a case of two pleas applying to one and the same count, proof rests with the defendant, ... 162
  and not with the plaintiff, ... ib.
  proof rests with the defendant in pleading denial and former judgment, ... 163
  in case of a former judgment or special plea, the defendant adduces proof, ... 165
  in a total denial, the plaintiff, ... ib.
  of a part when the whole claim is denied, is proof of the whole, ... 185
  should the evidence prove more or less than the claim, recourse may be had to other proof, ... 187
  in criminal prosecutions, proof of a part is sufficient for the whole, ... 188
  proof of custom depends on writing, ... 198
  in other cases possession is proof, ... 199
  in other cases, witnesses, ... ib.
  a defendant being content with his evidence, cannot resort to other means of proof, ... 257
  text of *Menu* cited, ... ib.
  erroneous construction noticed and refuted, ... 258
  another construction refuted, ... 259
Property, ... 105
  is fourfold, ... 1
Punishment, of unrighteous judges, ... 140
  corporal punishment is tenfold, and must not be inflicted on a *Brahmin*, ... 210
  other modes of, ... [illegible]

Digitized by Google

Page.

Punishment, special punishment for a delinquent *Brahmin* being a pauper, ... 210
additional mode of, ... 211
manner of branding, ... *ib.*
construction of a text of *Apastambha*, ... *ib.*
of the three inferior tribes, for repeated perjury. 261
of the priestly tribe, for the same offence, ... *ib.*
Brahmins may be fined, but on no account corporally punished, ... 262
Pupil, ... 226

R

Recrimination, ... 172
Redress,
a pupil may have redress against his tutor in certain cases, ... 226
a son against his father, ... 227
a wife against her husband, ... *ib.*
a slave against his master, ... *ib.*
Regents of the world, ... 302
Representative, ... 127
of a king, ... 138
qualifications of the, ... *ib.*
tribe of the, ... *ib.*
Reservoir, ... 321
Responsibility of the king, ... 134
Restriction, ... 75
on alienation, ... 3
Retort, &c., prohibited, ... 169
Revocation, ... 126
Reward to the finder of property, ... 232
Royal treasury, ... 236
Ruling power, ... 140

S

Sacred libation, ... 332
Sale, ... 220
Scales, ... 284, 310

Digitized by Google

Page.

Seasons, ... 290,291,330
Security, to be taken for the satisfaction of the award, ... 174
in default of security, the parties to be guarded, ... *ib.*
Servants, ... 229
Shares, of wives, ... 48
of the acquirer, ... 52
in case of land recovered, ... *ib.*
of the adopted son, ... 70
of the *Dwyamushayuna,* 71
Sisters, ... 28
' interest undefined, ... 25
Slave, ... 227
Slavery, ... 113
construction of the Sudder Dewanny Adawlut, on the subject of, ... *ib.*
origin and condition of, ... 114
classed as personal property, with one exception, ... 115
question as to the abolition, ... *ib.*
and as to substituting the Moohummudan for the Hindu law in this respect, ... 116
of permanent, ... 117
temporary, ... *ib.*
emancipation how obtainable, ... 118
Sons, ... 17,44,66,70,76,77,84,227,274
' son, ... 18,77
grandson, ... 18,274
Sorcery, ... 331
Sricrishna, ... 29
Stridhun, definition of, ... 38
succession to, ... *ib.*
where the deceased was unmarried, and married, ... *ib.*
if given to her by her father, ... 39
if not given to her by her father, ... 40
power of a woman over her, ... *ib.*
Suborner, ... 260
Sudra, ... 67
Suit,
what suits are invalid, ... 225
certain suits improper between what parties, ... 226
all such suits admissible, though not creditable, ... 223

Digitized by Google

Page.
Suit, certain married women may sue, ... 228
servants may sue for their own rights, ... 229
Summons, ... 144
to be served on him against whom the allegation is made, ... ib.
who should not be summoned, ... 145
further exceptions, ... ib.
who may be summoned, ... ib.
those exempted may be summoned in certain instances, ib.

T

Test,
enumeration of other tests for the ascertainment of guilt or innocence, ... 341
mode of ascertaining innocence, ... 342
time to be allowed, ... ib.
losing party to be subjected to fine and penalty, ... ib.
amount of fine, ... 343
is to be superadded to the penalty formerly denounced, ... ib.
Testimony, penalty for refusing to bear, ... 251
Title, ... 212
is not complete without possession, ... 217
acceptance necessary, ... ib.
acceptance is threefold, ... ib.
to land, incomplete without possession, ... 218
possession in some cases more weighty than a title, ... 219
the first acquirer not showing a title is punishable, ... 220
but to avoid the penalty, his son need only prove uninterrupted, and his grandson hereditary succession, ... ib.
the non-production of a title causes forfeiture to the son and grandson of the first acquirer, but penalty also to the first acquirer, ... 221
the defendant dying, pending a claim against him, his son must prove his title, possession not being sufficient, ... ib.
because the plea of possession would not have availed the original defendant, ... ib.
Tonsure, ... 75
Trial to be *bonâ fide*, ... 183

Digitized by Google

Page.

Trove,
property to be restored to the owner, ... 231
reason for declaring this rule, ... *ib.*
period for which trove property should be kept in deposit, ... 232
deductions to be made after certain periods, ... *ib.*
reward to the finder, ... *ib.*
period of limitation defined, not to annul the owner's right, but to authorize the king to use the property, 233
law relative to hidden treasure, ... *ib.*
exposition of the preceding text, ... 234
treasure to be restored to the owner after certain deductions, ... 235
the king must restore to his subjects property plundered from them, ... *ib.*
neglect also culpable, ... 236
if plundered property be not recovered, its amount must be paid from the royal treasury, ... *ib.*
Tutor, ... 226

U

Unequal partition, ... 6
Usurpation, ... 209

V

Vaisya, ... 248
Varuna, ... 320
Vasus, ... 302
Vivádárnavasetu, ... 48

W

Wager,
a wagering party being cast, must make good the fine and wager besides the claim, ... 182
wager may be by one party only, ... 183

Digitized by Google

Page.
Wager, in which case he alone is responsible for it, ... 183
each party responsible for his own wager, ... *ib.*
Ward, ... 105
Water, (ordeal by) 319,321
Widow, ... 19,66,68,76
Widowhood, ... 104
Wife, ... 84,87,101,227
childless wives entitled to share according to Bengal authorities, ... 47
share of, ... 48
where she has received property, ... *ib.*
Will, ... 36
to what cases applicable, ... 5
Witness, ... 271,272
may be by seeing or hearing, and may be either made or not made, ... 239
eleven classes of witnesses, five made and six not made, *ib.*
definition of made witnesses, ... 240
definition of witnesses not made, ... *ib.*
qualifications and number of, ... 241
explanation of the preceding text, ... *ib.*
incompetent witnesses are of five descriptions, ... 242
reasons of incompetency, ... *ib.*
those who are incompetent by reason of interdict, ... *ib.*
by reason of delinquency, ... *ib.*
by reason of contradiction, ... *ib.*
by reason of self-appointment, ... *ib.*
by reason of intervening decease, ... *ib.*
exception in cases of evidence after claimant's decease, 244
other incompetent witnesses enumerated, ... *ib.*
explanation of the terms of incompetency, ... 245
the text includes other incompetent witnesses formerly prohibited, ... *ib.*
exception as to the number of, ... 246
exception as to the qualifications of, ... 247
definition of offences, ... *ib.*

Digitized by Google

Page.

Witness, witnesses being found incompetent, recourse may be had to other means of proof, ... 249
superior respectability prevails over superior numbers, 253
application of a former text, ... *ib.*
where a claimant's witnesses depose against his claim, he may adduce others to confute their evidence, ... 254
objection replied to, ... *ib.*
contradiction punishable, ... 264
tampering with witnesses prohibited, ... *ib.*
standing mute, and deposing falsely, enjoined in *favorem vitæ*, ... *ib.*
expiation to be performed in such cases, ... 265
objection noticed, ... 266
and replied to, ... *ib.*
in this instance the graver offence is removed, though the slighter one remains, ... *ib.*
expiation not incumbent on casual false witnesses, ... 267
Worship, ... 302,304,320
Written proof,
general definition of, ... 269
rule respecting an instrument prepared by others, *ib.*
a contract may be binding without a writing, ... 270
distinguishing marks to be inserted in a writing, *ib.*
the obligor should subscribe the writing, ... 271
the witnesses also should subscribe, ... *ib.*
rule to be observed where the parties and their witnesses are ignorant of the art of writing,... 272
of a writing executed by the party himself, ... *ib.*
mode in which it should be drawn out, ... 273

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CONTENTS

OF THE

SECOND VOLUME.

Page.

CHAP. I. Of Inheritance.

Sect. 1. Of Sons, Sons' Sons, and Grandsons, ... 1
Sect. 2. Of Widows, ... 18
Sect. 3. Of Daughters, their Sons, &c. ... 39
Sect. 4. Of Parents, &c. ... 59
Sect. 5. Of Brothers, their Sons, &c. ... 66
Sect. 6. Of Sisters' Sons, &c. ... 82
Sect. 7. Of Fellow Students, &c. ... 100
Sect. 8. Of Sons' Widows, &c. ... 104

CHAP. II. Of Maintenance, ... 109
" III. Of Woman's Property, ... 121
" IV. Of Exclusion from Inheritance, ... 129
" V. Of Partition, ... 145
" VI. Of Adoption, ... 175
" VII. Of Minority, ... 203
" VIII. Of Gift, ... 207
" IX. Of Slavery, ... 265
" X. Of Debt, ... 277
" XI. Of Sale, ... 291
" XII. Of Evidence, ... 317

Index, ... 321

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OPINIONS

OF

THE HINDU LAW OFFICERS

ATTACHED TO

THE SEVERAL COURTS OF JUDICATURE

SUBORDINATE TO

THE PRESIDENCY OF FORT WILLIAM,

WITH REFERENCE TO QUESTIONS PROPOUNDED TO THEM

BY

THE JUDGES OF THOSE COURTS.

COMPILED AND ARRANGED

IN ILLUSTRATION OF

THE PRINCIPLES CONTAINED IN THE PRECEDING VOLUME.

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PRECEDENTS

OF

HINDU LAW.

CHAPTER I.

Inheritance.

SECTION I.

Of Sons, Sons' Sons, and Grandsons.

CASE I.

Q. A person instituted a suit against his brother, claiming a superior share of his father's property by right of primogeniture. In this case, is his claim available in law, or otherwise?

R. In the *(Cali Yuga)* present age, the specific deduction for the eldest brother is forbidden, as the following text expresses: "In the *Cali* age, a son must not be begotten *on a widow* by the brother *of the deceased husband,* nor must a damsel *once* given away *in marriage* be given a *second time,* nor must a bull be offered in sacrifice, nor must a water-pot be carried *by a student in theology,* nor must a larger portion be deducted for an eldest brother."

The eldest son is not entitled to a larger share in right of primogeniture.

Patna Court of Appeal, March 29th, 1814.

Sheo Bukhsh Sing *v.* Futtih Singh.

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CASE II.

Q. A person had two sons, on whose death a dispute arose between their children about the superior share which was alleged to have appertained of right to the eldest son in virtue of primogeniture. In this case, does the law allow a greater portion to the issue of the eldest son?

And the issue of a younger share equally with the issue of an elder son.

R. A father is at liberty to give his sons greater or less allotments of the wealth acquired by himself; but he is incompetent to do so, if it were property inherited from his own father, and such partition is illegal. According to the doctrines of the *Mitácshará* and *Menu,* there is no deduction of the grandfather's property, consisting of lands and other property, for the grandsons, as has been declared: "Among the issue of different fathers, the allotment of shares is according to the fathers."

By this it is understood, that, if one of the brothers had a son, and the other brother had four sons, the half of their paternal estate will devolve on the son of one brother, and the remaining half on the four sons of the other. The best portion of an eldest son is ordained by *Menu,* with reference to the father's self-acquisitions: "Let the eldest have a double share, and the next-born a share and a half, *(if these two clearly surpass the rest in virtue and learning;)* the younger sons must have each a share: *(if all be equal in good qualities, they all must share alike.)* Thus is the law settled."

It is meant, that the first-born is entitled to two shares, the middlemost to a half, and the rest each to a share. Or the eldest shall have a deduction of a twentieth part: "And either dismiss the eldest with the best share; or, if he choose, all may be equal sharers." This law relates to an unequal partition of the father's own acquisitions. *Náreda* forbids an equal partition after the death of the father: "After the death of the father, let the sons equally divide

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his estate." This intends, that after the demise of the father, sons may have equal shares. No unequal partition can be made with the choice of the father contrary to the law.

Náreda says:—" A father has no power, if his intellect be disturbed by sickness, or his mind agitated with wrath, or his affection partially set on the son of a favourite wife, to make a partition different from the law of inheritance."

So *Menu* says:—" Let sons divide equally the effects and the debts, after the death of both parents." How can it be said, because it is propounded by the image of holiness,* that no unequal partition of the patrimony, whether consisting of gold or the like, shall be made by the father, that the grandsons may have an unequal share of the property left by the grandfather? " Over land acquired by the grandfather, over a corrody *out of mines or the like, settled on him or his heirs by the king,* and over slaves employed in his husbandry, (or over gold and the like; *for the* word *dravya* is expounded variously), the father and the son, *when the grandfather dies,* have equal dominion."

According to this doctrine, the father is not at liberty to divide his ancestral estate between his sons according to his own will and pleasure.

Zillah Furruckhabad,
December 19*th*, 1803.

CASE III.

Q. A person died, leaving three sons and a widow, being the mother of all the sons. In this case, has the widow, on partition by the sons, any right over the property left by her husband, which consisted of a house and two shops? If so, what portion will devolve on her?

R. On the death of the proprietor, his three sons, and his widow, (being the mother of the sons,) are equally en- **The heirs being three sons and a widow, (their mother,)**

* *Yájnyawalcya.*

each will take a fourth on partition.

titled, on partition, to the inheritance; in other words, each individual of them will take one-fourth of the heritage. This opinion is consonant to the *Mitácshará.*

Zillah Moradabad.

CASE IV.

Q. Three uterine brothers lived in a joint and undivided state. The youngest of them obtained a grant of certain lands in his own name, but his brothers participated equally with him in the enjoyment of the produce. In this case, should all the brothers be considered joint proprietors of the land, or will the person who obtained the grant possess it exclusively? Should all the brothers be dead, the two elder leaving no son, but there being a daughter's son of the eldest, is such grandson in the female line entitled to receive any share of the property, or will the widow of the second brother and son of the person who acquired the grant exclude him, and take the entire estate to themselves?

A. Should the youngest brother have acquired the grant in his own name, by means of his own funds and labour exclusively, in this case, he (the youngest brother) is the sole legal proprietor.

According to the law of Bengal, the heirs of three brothers, being respectively a son, a daughter's son, and a widow, they will each take a third.

If the property have been earned by means of the common funds and labour of all the brethren, though granted in the name of the youngest brother, then the three brothers will be entitled to equal participation. Should all of them be dead, on failure of sons of the two elder brothers, the grandson in the female line of the eldest brother, and the widow of the second and son of the youngest brother will participate the estate equally, it having been acquired by means of common funds and labour. This opinion is conformable to the law, as current in Bengal.

Zillah Tipperah,
June 29th, 1815.

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CASE V.

Q. 1. A person had three sons, the eldest of whom, having been separated from his father, lived apart. Afterwards the father died. In this case, are only those sons who lived with him, entitled to succeed him; or have all his sons an equal right of succession?

One of three sons having separated himself from the family, and taken a share during his father's lifetime, has no further claim on the estate.

R. 1. Supposing the father, by mutual free will and consent, to have given some wealth out of his self-acquisitions to his eldest son, and separated him from his family, in this case, on the death of the father, the eldest son has no right to get any additional portion of his father's acquisitions from his brothers.

Authorities.

The texts of *Náreda* and *Vrihaspati* cited in the *Dáya-bhága* and *Viváda-chintámani:* "Shares, which have been assigned by a father to his sons, whether equal, greater, or less, should be maintained by them; else they ought to be chastised." "For such as have been separated by their father with equal, greater, or less allotments of wealth, that is a lawful distribution: for the father is lord of all."

Q. 2. If there had been no separation from the father, and the eldest son had left the family on account of a dispute which had taken place between his wife and the other members of the family; in this case, has the eldest son any right to share his father's estate?

R. 2. Supposing the father not to have given any property to his eldest son, or to have made any division of it, and the eldest son to have lived apart, then, on the death of the father, all his sons share the inheritance.

But mere living apart does not exclude.

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Authorities.

The text of *Yájnyawalcya*, cited in the *Dáyabhága*: "Let sons divide equally the effects and the debts, after the death of both parents."

Menu: "After the (death of the) father and the mother, the brethren, being assembled, must divide equally the paternal estate; for they have not power over it while their parents live."

Q. 3. Should the eldest son be entitled to inherit from his father, what portion of the self-acquisitions and of the ancestral property will devolve on him?

Sons share equally.

R. 3. On the death of the father, all the sons will equally divide their father's property, whether it consist of self-acquisitions or patrimony.

Authorities.

The text of *Menu*. See Reply 2.

Q. 4. Supposing the eldest son to have left his father, and to have lived apart, and subsequently to such separation, the father to have lived in a joint state with his other sons, who acquired some property while they were living with their father; in this case, how will such acquisitions be distributed among the sons?

Property acquired by exclusive labour, without using the patrimony, goes to the acquirer solely.

R. 4. The eldest brother has no right to the acquisitions of his brethren, provided they were made without the use of the patrimony, even though they were acquired while the sons were living with their father.

Authorities.

The text of *Vyása*, cited in the *Dáyatatwa* and other law books: "What a man gains by his own ability, with-

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out relying on the patrimony, he shall not give up to the co-heirs; nor that which is acquired by learning."

Q. 5. Subsequently to the eldest son's departure from the family house, the father, joining his labour to that of his other sons, acquired some property; in this case, will the eldest son share in the acquisition?

R. 5. Whatever property may be ascertained to have been the father's acquisitions made with the assistance of his other sons, his eldest son is entitled to a share in it, because all the sons have a right to inherit from the father.*

But property acquired by a father is on his death inherited equally by all his sons, whether they aided in the acquisitions or not.

Authorities.

The text of *Boudháyana*, laid down in the *Dáyatatwa*: "Male issue of the body being left, the property must go to them."

Zillah Nuddea, December 3rd, 1811.

Gowranga Parooe *v.* Rampersaud Parooe.

CASE VI.

Q. A person had four sons, one of whom died before him, leaving a son; and shortly after his son's death, the original proprietor died. There are now surviving his three sons and a grandson. In this case, is the grandson entitled to inherit from his grandfather?

---

* But this opinion is defective: the case being a Bengal one, the distinction should have been mentioned. In the *Dáyabhága* it is laid down, that those members of his family who contributed to the acquisitions by their personal labour are entitled to two shares, and that the idle member is entitled to one only; but the distinction does not obtain in other schools, the doctrine in general being, that all the brethren share alike, whenever the patrimony has been expended in making the acquisition, without reference to the degree of personal labour supplied by each.

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R. The son's son will equally share with his paternal uncles, though his father died before his grandfather.

A son's son shares equally with sons.

To this effect *Yájnyawalcya* says: "The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels."

Cátyáyana thus declares: "Should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his uncle's son: and the same *proportionate* share shall be allotted to all the brothers, according to law."

According to the above authorities, if a son die previously to partition, his son is entitled to his father's portion.

Zillah Bareilly,
January 19*th,* 1821.

CASE VII.

Q. A person died leaving seven sons, four of whom, after a lapse of time, were missing, and the remaining three took possession of the paternal estate, confiding the management of it to one of their number. In this case, will the property of the deceased devolve on his three sons and the missing sons' sons?

Sons' sons whose fathers are missing, inherit equally with sons.

R. The deceased proprietor's grandsons, whose fathers are missing, are entitled to share the property with his sons according to their fathers' shares. From the circumstance of the management being confided to one of them, the right of the others cannot be divested. This opinion is conformable to law.

Authorities.

"When the father is dead," &c. (*Dáyabhága,* page 9.)

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"Among the issue of different fathers, the allotment of shares is according to the fathers."

"And the dissipation of their hereditary maintenance is censured."*

Zillah Shahabad,
June 20th, 1804.

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* According to the Hindoo law, the term "missing person" implies a civil death, which should be presumed after the expiration of twelve years, (or twenty, according to another authority,) from the date of such person's forsaking the family, supposing that during this interval no intelligence of him has been received. At the end of such period, he is to be considered as dead, and his heirs succeed to his property. According to some authorities, however, the term of twelve years applies to missing persons whose age exceeds fifty years; and for all under that age the term allowed for re-appearance is twenty-four years. According to the *Nirnaya Sindhu*, there are three periods allowed for a missing person: in the first period of life, twenty years; for one of middle age, fifteen; and for one in the latter period of life, twelve years.—*Elem. Hindoo Law,* App., p. 246. It is not distinctly stated in this case, how long the four sons were absentees. If they were missing longer than the time allowed for re-appearance, then their sons are entitled absolutely to their respective shares; otherwise, they, according to the law as current in Benares, are entitled to a moiety only of their respective fathers' portions; and they are entitled also to the management of the other half, as their proprietary right over the grandfather's estate during the father's lifetime is recognized in the following extract from the *Mitácsharâ:*—"In such property as was acquired by the paternal grandfather, through acceptance of gifts, or by conquest, or other means, (as commerce, agriculture, or service,) the ownership of father and son is notorious; and therefore partition does take place. For, or because, the right is equal, or alike, therefore partition is not restricted to be made by the father's choice; nor has he a double share." But, according to the law as current in Bengal, they have a right to the management only of their missing fathers' shares, and they cannot compel their uncles to come to a partition of the paternal estate with them, as their right over such property is suspended until their fathers' death.

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CASE VIII.

Q. A landed proprietor had two sons. Of these, one died, leaving four sons, of whom two are living, and the other two dead, leaving their sons. In this case, to what proportion of the lands is each entitled?

Grandsons in the male line whose father is dead, and great-grandsons whose father and grandfather are dead, share with sons, and inherit *per stirpes*, not *per capita.*

R. Supposing the person in question to have died, leaving some landed property, and two sons, and, of the two sons, one to have died, leaving four sons, of whom two have since died, and the other two are living, then the property left by the original proprietor should be made into two shares, of which one will devolve on his son, and the remaining one will be subdivided into four parts, of which two will go to the two surviving grandsons, and the other two portions to the heirs of the two deceased grandsons. If, of the deceased grandsons, one had many sons, and the other had less in number, they will, in that case, take their father's respective shares, and divide them, according to the numbers of the brothers, among themselves. This opinion is conformable to the *Dáyabhága*, *Dáyacramasangraha*, and *Mitácshará.*

Authorities.

"Among the issue of different fathers, the allotment of shares is according to the fathers." The purport of the text, however, is this: If there be a numerous issue of one brother, and few sons of another, then the allotment of shares is according to the fathers. If there be one son living, and sons of another son (who is deceased), then one share appertains to the surviving son, and the other share goes to the grandsons, however numerous. For their interest in the wealth is founded on their relation by birth to their own father; and they have a right to just so much as he would have been entitled to. Accordingly, a great-grandson, whose father (as well as grandfather) is deceased, is in like manner an equal claimant with the son and grandsons; for he likewise presents a funeral oblation." This is laid down in the *Dáya-bhága* and is conformable to the *Dáyacramasangraha.*

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"If unseparated brothers die, leaving male issue, and the number of sons be unequal, one having two sons, another three, and a third four; the two receive a single share in right of their father, the other three take one share appertaining to their father; the remaining four similarly obtain one share due to their father. So, if some of the sons be living, and some have died leaving male issue, the same method should be observed; the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the text.—*Mitácshará.*

Calcutta,
Court of Appeal. }

CASE IX.

Q. The grandfather of the plaintiff had nine sons, A, B, C, D, E, F, G, H, and I, who on his death took possession of his estate. Three of them, A, B, and C, died, leaving no male issue. Afterwards one of the surviving brothers, D, died, leaving a widow, who succeeded to her husband's share, and, according to the decrees passed by the *zillah* and provincial courts,* the property left by the first deceased three brothers, namely, A, B, and C, was divided by the surviving five brothers, E, F, G, H, and I. The plaintiff now pleads, that, according to law, on the death of the widows of A, B, and C, their legal shares of the property should have devolved by right of succession on his (the plaintiff's) father and uncle, E and F alone, as they were living at the time when the widows above mentioned died, as the other three brothers did not survive them, and as their heirs, consequently, could have no right to inherit the property left by A, B, and C. In this case, what is the law as current in Bengal in this respect?

* The decrees here alluded to must have proceeded on a mistaken apprehension of the provisions of the Hindu law, which (as it is current in Bengal) prefers the widow to the brother in all cases.

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The right of representation descends lineally only, and does not extend collaterally.

R. On the death of C, leaving no heir down to a mother, his property real and personal should have devolved on his brothers of the whole blood, A and B, on whose death, in default of heirs down to the great-grandson, their property, which they inherited both from their father and brothers, should have devolved in equal portions on their respective widows. At their (the widows') death, leaving no heir, down to their husbands' uterine brothers, the property which they inherited from their husband should have devolved on their husbands' brothers of the half blood, E and F; as their husbands' other three half brothers, G, H, and I, died before them, and as consequently their sons could have no claim of inheritance. On the death of E and F, their sons will inherit, but not the sons of G, H, and I. This opinion is consonant to the *Dáyabhága, Dáyatatwa, Dáyacramasangraha,* and other authorities current in Bengal.

Authorities.

The following texts are cited in the works above alluded to.

Yájnyawalcya:—" The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates."

Cátyáyana:—" Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

Devala:—" Next let brothers of the whole blood divide the heritage of him who leaves no male issue." " If there be no uterine or whole brother, the half brothers of the same class with the deceased are entitled to the succession."—*Dáyacramasangraha.*

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Devala:—"When the father is deceased, let the sons divide the father's wealth."

Sudder Dewanny Adawlut, *July* 16*th*, 1814.

CASE X.

Q. A person had two wives, and by each of them a son. In the year 1202 Fuslee, a dispute arose between the two sons, and the father having reserved something out of his ancestral real property, (the lands of which were undivided, and formed his sole means of subsistence,) put the remainder into his sons' possession in equal portions: the engagement, however, for the payment of revenue, receipts, and other documents relative to the management of the property, continued to be executed in the father's name. From the year above specified, the son by the senior wife lived apart from his brother. After the father had made this disposition of the property between his two sons, a son was produced by his junior wife, in consequence of which he (the father) executed a document duly attested, in modification of his former disposition, to the effect that all the three sons, having equally shared the ancestral landed estate, should severally possess their respective portions. Consequently the third son, who is a minor, petitioned the court against his half and whole brother, to compel the delivery to himself of his own share. In this case, will the paternal immoveable property be equally shared and possessed by all the three brothers, or otherwise?

A minor son is not entitled to claim possession of his share of the joint property, which is in the hands of his brothers.

R. The action instituted by the brother who is under age (not having completed the age of sixteen) against his brothers of the half and whole blood for a third share of the patrimonial real estate, is not admissible, as *Sancha* says:—"Partition is allowed when the minor heirs attain the age of majority. A male ends his nonage at the expiration of sixteen years."

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Ydjnyawalcya:—"If the father make a partition among his sons, he may give at his pleasure, *more to some, and less to another*, and may give the first-born the portion of an eldest son, or divide the estate among all of them in equal shares." *Menu*:—"Shares, which have been assigned by a father to his sons, whether equal, or greater, or less, should be maintained by them: else they ought to be chastised.* Under these circumstances, when the minor shall attain the age of sixteen, he will be entitled to claim one-third of the paternal immoveable estate, in virtue of the disposition subsequently made by the father, and to obtain possession of his share from his brothers of the whole and half blood; but not before.†

Zillah Sarun,
November 29*th*, 1808.

CASE XI.

Q. The eldest brother of a *Sūdra* family, which consisted of four brothers and a sister, had one son by a female

* This is not a text of *Menu*, but of *Vrihaspati*. See *Dáyabhága*, page 50.

† From the tenor of the above opinion, it might be supposed that no partition can be made while there is a minor coparcener living, or until such minor shall attain the age of majority. But if a person die, leaving adult and minor heirs, it does not necessarily follow that his property shall not be divided among his heirs until the minor attain to majority; for if those who are of age are desirous of coming to a partition of their patrimony, the partition may be made during the minority of the brother. On the other hand, if those who are of age dissipate, or otherwise dispose of the entire joint property for the purpose of defrauding the infant who by law is incapable of managing his own affairs, in this case also the minor is competent to sue for partition through his guardian. The brethren may in such case be compelled to deliver the minor's share to his guardian, or to the ruling power in whose custody his share shall remain, until he attain the age of majority; but under no circumstances can a minor be entrusted with the management of his property before he comes of age; and the doctrine here maintained appears to go no further, than that a minor is not competent of himself to sue for possession of his share of the joint property.

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slave; and the sister, during her husband's absence, and while he was residing in a foreign country, had a son by a stranger. The other three brothers died, leaving no heir. Now there are two persons, namely, the son of the eldest brother, and the son of the sister, living, and each claims the property. In this case, on which of these survivors will the property left by the brothers devolve?

R. Under the circumstances above stated, in default of all heirs down to the daughter's son, the family being of the *Súdra* tribe, the entire property will devolve on the son begotten by the elder brother on a female slave. The son of the sister has no title to the inheritance. **The son of a *Súdra* by a female slave will inherit, if there be no other heirs down to a daughter's son.**

The text of *Yájnyawalcya* cited in the *Mitácshará*:— "Even a son begotten by a *Súdra* on a female slave, may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share: and one who has no brothers may inherit the whole property, in default of a daughter's son."*

Zillah Hooghly,
March 3rd, 1816.

Bukhtear Singh *versus* Buhadoor Singh and others.

---

* According to the Hindoo law, the illegitimate son of a *Súdra* man by a female slave, on a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes. It appears in this case that the parties are *Súdras*; but it is not distinctly stated whether the eldest brother died previously or subsequently to the death of any or all of his other three brothers, or whether the woman on whom the plaintiff was begotten by him was one of the fifteen descriptions of slaves, or was merely a concubine. If the woman were his slave, and the other three brothers died before the eldest, then the son begotten by him on the female slave would be entitled to the entire property. On the other hand, if one or more of the brothers died subsequently to the death of the eldest brother, the illegitimate son would be entitled to claim only such portion as belonged to his putative father, there being no law admitting the son of a *Súdra* by a female slave to share the estate of collaterals. If

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CASE XII.

Q. A person having assigned a moiety of his self-acquired landed estate to his sons by one wife, separated himself from them, and with the other half continued to live in a state of union with his son by another wife. On the death of the father, are the sons entitled to an equal portion of the estate left by him ?

Sons legally separated from their father have not, on his death, any claim to inherit with a son not separated.

R. Under the circumstances stated, the disposition of the estate made by the father will hold good, if not made through perturbation of mind occasioned by disease or the like, or through irritation against any one of his sons, or through partiality for the child of a favourite wife, in either of which cases each of his sons would be entitled to an equal share of the estate; otherwise, on his death, the sons who were separated from him during his lifetime have no claim to the inheritance.

Zillah Junglemehals,
January 19th, 1820.

CASE XIII.

Q. If in any particular country it should have been the ancient usage to make a distribution of property with a greater share to the eldest born, in right of primogeniture, is such usage to be upheld, notwithstanding the general prohibition against the right of primogeniture in the *Cali Yuga,* or present age? An answer to this question is required to be delivered according to the law of Behar.

R. Notwithstanding the general prohibition against the right of primogeniture in the *Cali Yuga,* or present age,

---

the woman were not his female slave, the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance; and under no circumstances could the son of the sister begotten as above have any right to succeed to his mother's brothers.

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if it has been the ancient and immemorial usage in any particular country to divide immoveable or other property, allotting a greater share in favour of the first-born, such ancient usage, so sanctioned by the consent of the inhabitants, must be upheld. This opinion is delivered in conformity to the *Vivádatandava, Veeramitrodaya, Vyavahâramayūc'ha, Raja Mártanda,* and other authorities current in Behar.

Authorities.

1st. The usages declared peculiar to provinces, tribes, and families, must be upheld; otherwise the people are distressed. The southern Brahmins intermarry with their maternal cousins. In the western provinces, artizans and others, who profess the Hindu religion, eat the flesh of kine. Authority for the above opinion.

To the eastward, Hindus eat fish, and their women commit adultery. In the northern countries, the Hindu females drink spirituous liquors, and the men approach them while in a state of impurity. Text of *Vrihaspati* cited in the *Vivádatándava, Veeramitrodaya, Vyavahâramayūc'ha,* and other authorities.

2nd. The usage of a country must be established from the commencement, and that which is established must be upheld in the country. Wise men learned in the law do not practise in opposition to popular will. Therefore the popular practice must be followed. Text of the *Raja Mártanda.* Ditto.

Sudder Dewanny Adawlut,
September 24th, 1814.

Sheobuksh Singh, appellant *versus* Futtih Singh, respondent.

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SECTION II.

Of Widows.

CASE I.

Q. A childless Brahmin dies, leaving his mother and a widow, him surviving. According to the law of inheritance, to which of these survivors does his property real and personal, belong? What is the rule of succession, in case of the mother and widow's living together in a joint state, and what is the rule if they are divided?

A widow succeeds to her husband's property, to the exclusion of his mother.

R. On failure of a son, grandson, and great-grandson, the widow has the proprietary right to her husband's estate; and this is the rule, whether the mother lives jointly or separately. She cannot in any case have a right to the succession while there is her son's widow. This opinion is conformable to law.

Zillah Chittagong,
May 22nd, 1817.

CASE II.

Q. A person dies, leaving a widow and a brother of the whole blood. According to law, does his property appertain to his widow, or should it devolve on the brother, he furnishing the widow of his deceased brother with maintenance?

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R. On failure of heirs down to the great-grandson, the widow, according to the law of Bengal, is entitled to enjoy her husband's property during her life, whether consisting of lands or other property, and the brother has no right of succession while she survives.

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Authorities.

Vrihaspati: " Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, a mother, or uterine brother, be present."

Vrihat Menu: " The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share."

Ydjnyawalcya: " The wife and the daughters, also both parents, brothers likewise," &c.

Vishnu: " The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters, &c. This opinion is delivered according to the doctrine of the *Ddyabhdga*," &c.*

Dacca Court of Appeal,
August 19th, 1819.

CASE III.

Q. A person died, leaving a widow and a brother of the half blood. Subsequently to his death, the widow violated the hitherto unsullied bed of her husband, and had a child by a paramour of another class, while the brother's conduct was consistent with his religion; in this case, which of the two is entitled to succeed to the property of the de-

* The above opinion was delivered conformably to the doctrine current in Bengal. In Benares and elsewhere, the widow would not have been entitled to succeed, and the brother would have been the heir, if the family was united. But according to all the doctrines of Hindu law, it is agreed, that the widow has not unlimited power over her husband's estate. She has only a life interest. She cannot sell or otherwise alienate it, except for special purposes; and on her death, it devolves on the husband's brothers or other heirs. See Case 12, and cases of gift and sale, *passim*.

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ceased? Supposing the widow during the lifetime of her husband to have cohabited with a stranger, and to have therefore been expelled from the family, and to have lost her reputation, has such widow any right to inherit her husband's property?

An unchaste widow forfeits all right to her late husband's property.

R. It is the general doctrine, that the virtuous widow of a man who dies leaving no heir down to the great-grandson, succeeds; but that if she, on the death of her lord, be faithless to his bed, she has no right of succession: consequently the widow in such case would be excluded by her husband's half brother. So in the case of her having acted unchastely while her husband was living. The authorities for this opinion are laid down in the *Dáyabhága* and other books of law.

Authorities.

Vrihaspati: "If her husband die before her, she shares his wealth. This is a primeval law."*

Cátyáyana: "Let the widow succeed to her husband's wealth, provided she be chaste." "The childless wives, conducting themselves aright, must be supported; but such as are unchaste, should be expelled; and so indeed should those who are perverse."†

Vrihat Menu: "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share."

Náreda: "But a wife, who does malicious acts injurious to her husband, who has no sense of shame, who destroys his effects, or who takes delight in being faithless to his bed, is held unworthy of the property before described."

Zillah Hooghly.

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* *Dáyabhága*, 159. † *Mitácshará*, 363.

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CASE IV.

Q. There were two brothers, of whom one died, leaving sons, who are still alive; and the other died leaving a son, who also died, leaving a widow, him surviving. The widow had become a prostitute, and had violated her husband's bed. In this case, is she entitled to inherit her husband's estate, and if not, on whom does his property devolve?

R. If it be proved that the widow in fact did not keep her husband's bed unsullied, she has no title to his property and ought to be expelled from his house. His estate, in default of heirs down to the uncle, should devolve on his uncle's sons. This opinion is in conformity to the authority contained in the *Dáyabhága*, &c.

And may be expelled from his house.

Zillah 24-*Pergunnahs*,
July 18*th*, 1811.

CASE V.

Q. Raja Bhuwa-bul Deo died, leaving four sons, namely, Baboo-Iswari-buksh Deo, Baboo Dilgunjun Deo, Baboo Ahlad Singh, and Baboo Soobhnath Singh, of whom the eldest (Baboo Iswari-buksh Deo) died, leaving a minor son and two widows, the elder called Ranee Sheoraj Koonwur, and the younger Ranee Ahbeeman Koonwur, and subsequently the minor died. Ahlad Singh died, leaving Hurucnath and Jynath as his sons and representatives; lastly, Dilgunjun Deo died childless, leaving a widow called Ranee Goolab Koonwuree; and Soobhnath is still living. In this case, whether will the property left by Dilgunjun Deo, devolve on his widow Goolab Koonwuree, on his brother Soobhnath, or on his brother's sons Hurucnath and Jynath?

R. Supposing Dilgunjun to have left neither son, son's son, nor son's grandson at his death, but to have been survived by his widow Goolab Koonwuree, his brother Soobhnath Singh, and his brother's two sons Hurucnath

According to the Hindu law as current in Benares, the widow will succeed to the

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exclusion of the brother, if the estate was divided; but if undivided, the brother will exclude her; and the brother in either case excludes the brothers' sons.

and Jynath, his widow is alone entitled to succeed to his real and personal estate, provided it be divided. If Bhuwabul Deo died, leaving four sons, Iswari-buksh, Dilgunjun, Ahlad, and Soobhnath, and his estate was undivided, then the uterine brother Soobhnath is entitled to inherit the portion to which his late brother Dilgunjun was entitled, whose widow has a right to demand food and raiment only until her death. This opinion is conformable to the *Mitácshará* and other law tracts which are current in the western provinces.

Authorities.

"The wife and the daughters, also both parents, brothers likewise, and their sons, gentiles, cognates.—*Yájnyawalcya*, cited in the *Mitácshará*.

"The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers; after them, it descends to the brother's sons."—*Vishnu*, cited in the same authority.

"The rule, deduced from the texts (of *Yájnyawalcya*, &c.), that the wife shall take the estate, regards the widow of a separated brother."—*Mitácshará*.

Menu: "To the nearest kinsman *(Sapinda)*, the inheritance next belongs."

Sudder Dewanny Adawlut,
May 10*th*, 1824.

Baboo Hurperkash Singh *v.* Baboo Dilgunjun Deo.

CASE VI.

Q. A person died possessed of an ancestral landed estate and other property, leaving three sons, who, subsequently to their father's death, jointly and undividedly en-

joyed the estate. One of them died a short time after, leaving a widow and a daughter while the estate was held in joint-tenancy, and on his death his widow obtained his share of the moveable property, and at present she claims one-third of the landed estate. In this case, is she entitled to take her husband's portion of the undivided ancestral immoveable property, or not?

R. Under the circumstances above stated, the widow is not entitled to any portion of the undivided ancestral landed estate.

According to the law as current in Benares, the widow of an undivided brother has no right to her husband's property.

Authorities.

Boudháyana, after premising, "A woman is entitled," &c. proceeds, "not to the heritage, for females, and persons deficient in an organ of sense and member, are deemed incompetent to inherit."

Náreda: "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord."

Zillah Sarun,
March 2nd, 1807.

CASE VII.

Q. 1. A person died, leaving his father, brother, widow, daughter, and daughter's son; in this case, in what proportions will these persons respectively be entitled to share the property which the deceased acquired?

R. 1. Supposing the deceased to have acquired the property without the use of his father's funds, and to have left his widow, daughter, daughter's son, father, and brother him surviving, his acquisitions should be made into four

Distribution of joint-property, the claimants being a father, brother, widow, daugh-

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ter, and daughter's son.

shares, two of which go to the father, and the remaining two to the widow. *Cátyáyana* says: "A father takes either a double share or a moiety, of his son's acquisition of wealth." "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." If the acquisition was made with the aid of the paternal property, and the acquirer be survived by the individuals above mentioned, the father would take a moiety of the goods acquired by his son, the acquirer's widow two shares, and his brother one share.

Circumstances under which a widow excludes a brother.

Q. 2. A person living in a state of union with his two brothers, acquired some property moveable and immoveable, with or without the use of the patrimony, and with the sanction of his father divided his own acquisitions and the paternal estate with his brothers. The partition was formally entered into, and documents were drawn out by each of the brothers. The brother alluded to, died before his father; and then the father died. In this case, will the brother's widow, daughter, and daughter's son take his property exclusively, or will his surviving brothers be entitled to any part of it?

R. 2. Under the circumstances stated, the widow is alone entitled to succeed her husband.

Q. 3. Supposing the brother alluded to, without the consent of his father, to have joined with his brothers in making a division of the patrimony and their respective acquisitions, to have made the division by executing formal deeds of partition, and to have died before his father, who made objections to the validity of those deeds; in this case, to which of those individuals, being his widow, daughter, daughter's son, and brothers (the father being dead), will his property go?

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R. 3. Under the circumstances stated, the brothers are entitled to that portion of the property which may be ascertained to be the ancestral estate; and of any property which may be proved to be the deceased's personal acquisitions made with the use of the father's funds, the brothers first take one moiety by right of their deceased father, and out of the remaining half, the acquirer's widow will take two shares, and the other brothers one each. If the property have been acquired exclusively by the deceased brother, without any detriment to the patrimony, then, on the death of the father, the brothers must have a moiety of the acquisitions as their father's share, and the acquirer's widow the residue.

Distribution between a widow and her husband's brothers, the husband having died in the lifetime of his father.

Q. 4. Is a daughter, during her mother's lifetime, competent to sue her uncle for her father's property, by virtue of her right of succession?

R. 4. A daughter is not competent to bring an action against her paternal uncle, founded on her right of inheritance to her father's property, while her mother exists.

A daughter cannot claim succession while her mother lives.

Q. 5. A widow brought an action, claiming her late husband's property, against his brothers, and afterwards executed a release, by relinquishing not only her own right and title, but that of the deceased's daughter and daughter's son, in favour of the brothers. In this case, is the daughter at liberty to bring an action against her mother and uncles for the share of the joint-property which belonged to her deceased father?

R. 5. Supposing the widow to have sued her husband's brothers for his legal share, and to have entered into a release, with an intention to defeat the right of her daughter and daughter's son, the daughter is competent to sue her mother and uncles to annul the transaction. It is pro-

Unless the mother do some act tending to defeat her right.

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hibited by law to the widow to make an alienation of any property, excepting her own peculiar property, while the heirs exist.

By such an alienation the hereditary means of maintenance would be destroyed: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and dissipation of their hereditary maintenance is censured."

Zillah Hooghly,
July 8th, 1815.

CASE VIII.

A woman has no claim to her missing husband's share of his father's property.

Q. 1. A person, ten years before his father's death, forsook his family and resided in another country, and no intelligence has been received regarding him since his departure. Is his wife, immediately on the death of his father, entitled to institute a suit for her husband's share of the patrimony against his two brothers of the half blood?

R. 1. The wife of the missing person has no right to claim her husband's share of the patrimony, but she must be provided by his brothers with food and raiment.*

Q. 2. What is the time fixed by law, at the expiration of which a missing person is to be considered as dead?

The time allowed for the reappearance of a missing person is 12 years, after which his death is to be presumed.

R. 2. Should a person have proceeded to a foreign country, and no intelligence of him have been received for the space of twelve years, he is, at the end of that period, to be considered as dead, and his exequial ceremonies should be performed by his representatives. Should they not then perform such ceremonies, they act sinfully.†

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* This is not the law of Bengal.

† But see note to Case 7, of Sons, &c., page 9.

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Menu says: " And their childless wives, conducting themselves aright, must be supported; but such as are unchaste, should be expelled; and as, indeed, should those who are perverse."*

City Patna,
August 28th, 1804.

CASE IX.

Q. A person had a family by two wives, namely, by the first wife, a son, and by the second, two sons. These three brothers continued to live together as a joint and undivided family; and some time after, one of them, being the issue of the first wife, proceeded to a foreign country, and no intelligence concerning him has been received for the period of fifty-five years, during which time his wife lived under the protection of his brothers, who managed the estate as before. Now the wife of the missing person claims the share of her husband. In this case, is she entitled to her husband's legal share, or only to her proper maintenance?

The wife of a person who has been missing for fifty-five years has no right to claim his share of the joint-property, according to the law of Benares.

R. Supposing the wife of the missing person to have lived with her husband's brothers as a joint and undivided family for the period of fifty-five years, her claim is inadmissible and illegal, according to the law of Benares.

Authorities.

Boudháyana, after premising, " A woman is entitled, &c." proceeds, " not to the heritage; for females, and persons deficient in an organ of sense, or member, are deemed incompetent to inherit."

It should not be argued, that the wife of a missing person, regarding whom intelligence has not been received for fifty-five years, has any right to her husband's share of the joint ancestral landed property.

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* *Yájnyawalcya.* Vide *Mitácshará,* page 329.

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Náreda says: "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord."

Zillah Sarun.

Q. How would the law in this case be in Bengal?

But has a right according to the law of Bengal.

R. According to the law as current in Bengal, the widow would be entitled to her husband's share.

CASE X.

Q. An individual had two sons, A and B. The eldest, (A) died before his father, leaving a son and a widow. Subsequently the father died, leaving a family consisting of B and his wife, and A's son and widow; and at his death he also left some landed property. Some time after this, the son (B) died, leaving his widow, and his brother's son and widow him surviving. In this case, what proportions of the property of B will respectively devolve on the eldest son's son and widow, and on the younger son's widow?

The claimants being a brother's son and a widow, the former will take the property, if the family was joint; but the latter if separate, according to the law of Benares.

R. If A's son, his widow, and the widow of B, lived together as a joint family at the time when B died; according to law, A's son is alone entitled to the estate, but it is necessary for him to provide B's widow with food and raiment equal to her condition of life. If they formerly lived apart, and the share of B was separated, then his widow is entitled to the property which fell to her husband's legal share. A's widow has no right of succession, but she must be provided by her son with proper maintenance.

Zillah Moradabad.

Doorgapersaud *v.* Khuma and another.

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CASE XI.

Q. Of three landed proprietors, two died, each leaving a widow, and the third died, leaving two sons, him surviving. The widows and the two sons of the last deceased jointly possessed the ancestral landed estate. Subsequently the widow of the eldest brother died; then the eldest son of the third brother, leaving a widow and his brother, who subsequently died unmarried. Lastly, the widow of the second brother died. There are now surviving only the widow of the third brother's son, and a descendant in the fifth degree of her husband's paternal line. Under these circumstances, according to law, which of these two survivors is entitled to the landed estate?

R. Under the circumstances above stated, the surviving widow has no title to inherit from her *Sapindas*, or the persons who partake of undivided oblations.

A widow cannot inherit property left by her husband's relatives or their widows.

Authorities laid down in the *Dáyabhága. Boudháyana,* after premising, "A woman is entitled, &c." proceeds, "not to the heritage; for females, and persons deficient in an organ of sense, or member, are deemed incompetent to inherit." By the mention of "not to the heritage" is understood, that a woman is declared incompetent to succeed her *Sapindas* and the like. The *Sapinda* of the fifth degree is entitled to the succession. To this effect is the text of *Menu* contained in the *Dáyabhága:* "To the nearest kinsman *(Sapinda,)* the inheritance next belongs." *Cullūcabhatta* thus comments on the above passage: "Of the *Sapindas,* whosoever becomes nearest is entitled to the inheritance. The term *Sapinda* extends to the seventh person, *or the sixth degree of ascent or descent.* So also the text of *Menu* cited in the same authority: Now the relation of the *Sapindas,* or men connected by the funeral cake, ceases with the seventh person, *or in the sixth degree of ascent or descent;* and that of *Samanodacas,* or those

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connected by an equal oblation of water, ends only when their births and family names are no longer known."

The *Sapindas* are entitled to the succession of their *Sapindas* by reason of conferring benefits on them by presenting oblations to their manes, but not their wives. This is conformable to the *Dáyabhága, Dáyatatwa, Cramasangraha,* and other authorities.*

Zillah Mymunsigh.

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* Although the widow of the third brother's son is entirely excluded from inheriting the property left by his uncle's widow, yet of the estate enjoyed by the three brothers she is entitled to one-third.

On the death of two of the proprietors, their widows were their sole heirs, and they were entitled to take two shares out of three, or one share each in right of their respective husbands.

On the death of the other brother, his heirs being two sons, his share should have been made into two parts, of which each of his sons was entitled to one.

On the death of the widow of the eldest brother, her property, that is, one share which she inherited from her husband, should have been made into two parts, of which her husband's brother's sons were each entitled to one.

On the death of the eldest son of the third brother, his property should have been inherited by his widow, to the entire exclusion of the others.

On the death of the other son of the third brother, his property should have devolved exclusively on his nearest *Sapinda*, who by law becomes his legal heir; and on the death of the widow of the second brother, her property should also have devolved on her nearest *Sapinda*, a female having no title to inherit from her *Sapindas*.

Consequently, supposing neither of the surviving individuals to have received any share, the property should be made into six parts: of which the widow of the third brother's son will take in right of her husband two shares, one of which he inherited from his father, and the other from the widow of his paternal uncle, the eldest son of his grandfather; and the *Sapinda*, or the fifth in degree of the paternal line, will take the remaining four, that is to say, two which he inherited from the second brother's widow, and the other two from the second son of the third brother.

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CASE XII.

Q. A childless widow instituted an action against some individuals, being her husband's heirs, claiming the sum of 300 rupees, as her right of maintenance. It appears that the plaintiff's husband died, leaving two widows, namely, the plaintiff and another, the mother of three sons. In this case, is the claiming widow entitled to any share of her husband's estate, or to maintenance only out of the property?

R. A childless widow is entitled to receive only food and raiment out of her husband's estate, where there is a son surviving, and she is not entitled to participate in the wealth. **A widow is entitled to maintenance from her step-sons.**

Zillah Chittagong,
August 5th, 1817.

CASE XIII.

Q. A person who had two sons, divided his whole property, consisting of assessed and rent-free lands and household goods, between them in equal portions, reserving nothing for himself; and at the same time it was conditioned, that for the remainder of his life he should reside for six months in the house of the elder son, and be supported by him, and for the other six months in that of the younger son, alternately. At the time when the partition was made, the father had no ready money; but, subsequently, some money was acquired by the elder son, with which a mercantile concern was carried on by the younger son, who had then acquired no property. The elder son died, leaving a widow and daughter; afterwards the father died before his younger son and his elder son's widow and daughter. At the death of the elder son, his widow came into the possession of her husband's share which he received at the partition; but on the death of the younger son, his widow ousted the widow of the elder son from her husband's share. In this case, to what proportion is the widow of the elder son entitled?

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Case in which the widows of two brothers inherit equal shares of property.

R. Of the two brothers who received the property at the partition made by the father, supposing the elder to have acquired some property, and to have died before his father and widow, in this case, his widow is entitled to the whole of that which her husband took on the partition; and her husband's *acquisitions* should be made into four parts, to two of which she is entitled, and the widow of the younger son has a right to the remainder.

"The wife," &c. Vide *Dáyabhága,* page 160.*

Zillah Hooghly.

CASE XIV.

Q. 1. A Hindu acquires landed property by means of his own funds, or by means other than those of the joint funds, at a time when he is living in partnership with his brethren. Do such lands after his death go to his undivided brethren, or to his widow? If they go to his widow

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* This is doubtless an accurate exposition of the Hindu law, provided the property divided had been acquired by the father; otherwise, had the property been ancestral, and had his wife been living, and capable of bearing children, the partition would have been illegal, and the widow of the elder son would have had no right to the property which fell to her husband's share at the partition made by the father; for it is a settled rule of law, that when a father makes a partition of his patrimony between his sons, he is bound to reserve the double share of a son; otherwise the partition should not be considered as lawful. But of any property that may have been acquired by the personal exertions and labour of the elder son, unaided by the father's or brother's funds or labour, a moiety should be taken by his widow, and the other half by the widow of the younger son, in right of her father-in-law, to whose share her husband was entitled to succeed. On the other hand, if the property have been acquired with the aid of the father and brother, and the family be undivided, such acquisitions should be made into six shares, of which one-third should go to the widow of the acquirer (the elder son), and the remaining two-thirds to the widow of the younger son, the father being entitled to one-half, and the acquirer to a double share of such acquisitions.

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has she or has she not a right to dispose of them by sale or gift; and, if she has not a right to dispose of such lands by sale or gift, to whom will they devolve after the death of the widow? To her husband's heirs, or to whom?

R. 1. A Hindu acquires landed property by means of his own funds, or by means other than those of the joint funds, at a time when he is living in partnership with his brethren. Under these circumstances, such lands are not divisible among his brethren. After his death, therefore, the right to them will be vested in his widow, and not in his undivided brethren. But in such case, the widow has no right, without the consent of her husband's heirs, to dispose of the lands so devolved upon her from her husband by sale or gift, and after the death of the widow, the right to such landed property will be vested in the heirs of her husband. This opinion is delivered in conformity to the *Vivádachintámani*, the *Vivádaratnácara*, the *Vyavahárachintámani*, and other authorities current in Tirhoot.

Property acquired without using the patrimony by one brother living in partnership, belongs to him exclusively.

After his death, it goes to his widow, who has, however, no right to dispose of it; and after her death, it devolves on his brethren.

Authorities.

1st. What a brother has acquired by his labour, without using the patrimony, he need not give up without his assent; for it was gained by his own exertion. Texts of *Menu* and *Vishnu* cited in the *Vivádachintámani*, *Vivádaratnácara*, and other authorities.

Authority for the first part of the opinion.

2nd. That which is acquired without detriment to the joint stock, belongs exclusively to the acquirer. Interpretation of the text in the *Vivádachintámani*.

Ditto.

3rd. Property acquired without detriment to the joint stock is indivisible. Interpretation of the *Vivádaratnácara*.

Ditto.

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Authority for the second part of the opinion.

4th. As by no text is a woman authorized to dispose of, by gift or sale, immoveable property given to her by her husband; in like manner she has no authority to dispose of, by gift or sale, her husband's immoveable property which she has inherited. *Vivádachintámani.* So also the *Prakásh* and *Ratnácara.*

Ditto.

5th. When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. Text of *Náreda* cited in the *Vivádaratnácara,* and other authorities.

Ditto.

6th. A gift, pledge, or sale of lands, houses, or slaves, by a dependant person, is invalid or inefficient. Text of *Cátyáyana* cited in the *Vyavahárachintámani.*

Ditto.

7th. Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it.

Q. 2. If a Hindu, in the presence of his undivided brethren, made over to his wife his own share in the joint ancestral property, and the lands acquired by him in the mode described in the preceding question, as her *Stridhun* or peculiar property, will such lands after his death go to his widow as her *Stridhun*, or will they devolve on his undivided brethren; and, if they go to the widow of the proprietor, has she, or has she not a right to dispose of them by sale or gift: and, if she has not a right to dispose of them by sale or gift, to whom will they belong after her death? To her husband's heirs, or to whom? An answer to these questions is required to be delivered according to the law of Tirhoot.

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R. 2. If a Hindu, as stated in the second question, in the presence of his undivided brethren, made over to his wife his own share in the joint ancestral property, and the lands acquired by him in the mode described in the preceding question, as her *Stridhun* or peculiar property, without any opposition or objection being made on the part of his brothers, from which their assent is inferrible, then under such circumstances, after his death, the right to his property will be vested in his widow, and not in his undivided brethren. In which case, his widow is not at liberty to dispose of the lands in question by sale or gift, no more than she is entitled to dispose of other immoveable property given to her by her husband, which forms her *Stridhun* or peculiar property: and, after the death of the widow, (should she leave no son, nor daughter, nor grandson, nor grand-daughter,) her sister's son, or the son of her husband's brother, or of his sister, or of her own brother, or her son-in-law, or her husband's younger brother, will successively inherit such immoveable property given to her by her husband, which is in the predicament of her *Stridhun* or peculiar property. In default of all those above mentioned, the property will go to the nearest *Sapinda* of her husband. This opinion is delivered in conformity to the *Vivádachintámani, Vivádaratnácara,* and other authorities current in Tirhoot.

That which is given by a husband to his wife, is termed her *Stridhun*, or peculiar property.

But if such property given to her by her *husband* be *immoveable*, she has no right to dispose of it. On her death it goes to her heirs, in preference to the heirs of her husband.

Authorities.

1st. That which is received from affectionate kindred, or earned by valour, or given to a woman by her relations with the consent of her husband, is a valid acquisition. Text of *Vrihaspati,* cited in the *Vivádachintámani, Vivádaratnácara,* and other authorities.

Authority for the first part of the opinion.

2nd. A person may dispose of his own acquisitions as he pleases. Text of *Vrihaspati,* cited in the *Vivádachintámani, Vivádaratnácara,* and other authorities.

Ditto.

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Authority for the first part of the opinion.

3rd. That which is received by a married woman or maiden, in the house of her husband or of her father, from her husband, or from her parents, is termed the gift of affectionate kindred. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and sale, according to their pleasure, even in the case of immoveables. Text of *Cátyáyana,* cited in the *Vivádachintámani, Vivádaratnácara,* and other authorities.

Authority for the second part of the opinion.

4th. The power of women having been declared generally over property given by affectionate kindred, an exception is here propounded in the case of immoveable property given to her by her husband. Interpretation of the text in the *Vivádaratnácara.*

Ditto.

5th. What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or may give it away, excepting immoveable property. Text of *Náreda* cited in the *Vivádachintámani, Vivádaratnácara,* and other authorities.

Ditto.

6th. A woman's property goes to her children, and the daughter is a sharer with them. Text of *Vrihaspati,* cited in the *Vivádachintámani, Vivádaratnácara,* and other authorities.

Ditto.

7th. Daughters share the residue of their mother's property, after payment of her debts, and the male issue succeed in their default. Text of *Yájnyawalcya,* cited in the *Vivádachintámani, Vivádaratnácara,* and other authorities.

Ditto.

8th. Male issue includes the grandson, and great-grandson in the female line. Interpretation of the text in the *Vivádachintámani.*

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9th. The mother's sister, the maternal uncle, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers. If they leave no issue of their bodies, nor son (of a rival wife), nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property. Text of *Vrihaspati,* cited in the *Vivádaratnácara,* and other authorities. Authority for the second part of the opinion.

10th. Where there are many kinsmen, cognates, and relations, the first in order takes the estate of one dying and leaving no male issue. Text of *Vrihaspati,* cited in the *Vivádaratnácara.* Ditto.

Sudder Dewanny Adawlut,
December 1*st,* 1814.

Sheonarain Singh, appellant *versus* Jhudda Singh, respondent.

CASE XV.

Q. A Hindu inhabitant of Patna died, leaving three wives him surviving. Of these three, the first was childless; the second had three daughters, and the third had one daughter. Under these circumstances, on the death of the childless wife, to whom does her share of the property legally belong, and who is entitled to claim it, according to the law as prevalent in that part of the country?

R. If a Hindu inhabitant of Patna die, leaving three wives; the first, childless, the second, having three daughters, and the third, one daughter, of whom the childless one died, in this case, the surviving two widows of her husband are entitled by law to her share of the property, and to sue for the same; because, although a widow succeeds to her husband's property in default of male issue, yet, on her death, it goes to her husband's nearest heirs, and in this instance his nearest heirs, in default of son, grandson, and great-grandson, are his widows. This is the law according to the A man dying and leaving three widows, who inherited his property, on the death of one of them without issue, the two others will take her share.

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Mitácsharú, Veeramitrodaya, Vyavahúramayūc'ha, Vyavahárakoustūbha, and other authorities current in Patna, and the adjacent places.

Authorities.

The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die; after her the legal heirs shall take it."—*Cátyáyana.*

The wealth of him who leaves no male issue, goes to his wife; on failure of her to his daughter, &c.—*Vishnu.*

A wife, daughters,* &c.—*Yájnyawalcya.*

Sudder Dewanny Adawlut, }
July 12*th*, 1827. }

Doonda Singh, appellant *v.* Musst. Doorga Koonwur.

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* The case stated is that of a widow dying childless, and being survived by two other widows of her husband, each of whom had issue; but it would have been the same had the deceased widow been the mother of a daughter or daughters; the property going at her death to the nearest heirs of her husband, who are in this instance his wives and not his daughters. But all the daughters would inherit equally on the death of all the three widows.

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SECTION III.

Of Daughters, their Sons, &c.

CASE I.

Q. A landed proprietor dies, leaving two married daughters, and one unmarried. Of the two married daughters, one files a plaint in a court of justice, claiming a third of the estate left by her father. In this case, who is entitled to the succession? Can a married daughter sue for partition, where there is a maiden daughter living?

R. Of the daughters, the maiden one is, in the first place, heir to the paternal property, by reason of her offering the funeral oblations to the deceased father, to the entire exclusion of all the others. **A maiden excludes all married daughters.**

Authorities.

The text of *Menu,* laid down in the *Suddhitatwa* and other law books: "The maiden daughter of a person who dies leaving no male issue, offers the funeral cake to his manes."*

Accordingly, where there are married and unmarried daughters, the maiden exclude the married daughters from the inheritance. To this effect the *Dáyabhága* cites the text of *Parasara:* "Let a maiden daughter take the heritage of one who dies leaving no male issue; or, if there be no such daughter, a married one shall inherit." *Menu:* "His

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* This is not a text of *Menu*, but of *Rhishyasringa.*

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own maiden daughter, born in holy wedlock, shall like a son, take the inheritance of him who dies without male issue."*

First, the maiden daughter takes the inheritance, then the daughter who has been betrothed, and lastly, the married daughter: this is the rule of the daughters' succession. The claim, therefore, of the married daughter is inadmissible.

City of Dacca,
January 8th, 1817.

CASE II.

Q. A person died, leaving a widow and two daughters, one married, and the other a maiden. Subsequently to his death, the widow disposed of her maiden daughter in marriage, and brought the bridegroom to her own house, where he resided with her family until her death, and managed her property. The widow having executed a deed of gift, in which she assigned her husband's whole property to her son-in-law, who lived with her, gave the donee possession of the gift, and then died. The son-in-law performed her funeral rites, and he was deprived of his share of his own paternal estate by reason of his living in the house of his father-in-law. The original proprietor's married daughter now claims the half of the paternal estate, that is, a moiety of the gift. In this case, was the widow competent to make a gift of her husband's property to her second daughter's husband, though her other daughter was living?

Married daughters succeed to equal portions of an estate which had devolved

R. If a person, being destitute of male issue, and living apart from his brothers, die, leaving two daughters and a widow; in the first instance, the widow succeeds, and on her death the daughters are equally entitled to the inheri-

* This is not a text of *Menu*, but of *Devala*.

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tance; consequently, while the proprietor's two daughters are living, the widow cannot give her husband's whole immoveable property to her second daughter's husband without the sanction of her eldest daughter, but she might have made a donation of the moveable property. The gift of the immoveable estate made by the widow is illegal. On her death, her two daughters will equally share their paternal landed estate. This opinion is conformable to the *Mitácshará* and *Vyavahháramayúc'ha.*

on their mother at the death of their father, by reason of there being no male issue.

Authorities.

Yájnyawalcya:—"The wife and the daughters,"* &c.

Vrihat Vishnu:—"The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters."

Cátyáyana:—"Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, the daughter inherits."

Vrihaspati:—"Let the wife of a deceased man, who left no male issue, take his share. The wife is pronounced successor to the wealth of her husband; and in her default, the daughter. As a son, so does a daughter of a man, proceed from his several limbs. How then should any other person take her father's wealth?"

"The daughters share the residue of their mother's property, after payment of her debts."†

"By favour of the father, clothes and ornaments are used, but immoveable property may not be consumed, even with the father's indulgence."

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* *Dáyabhága*, page 160. † *Yájnyawalcya*, See *Mit.*, p. 266.

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"The father is master of the gems, pearls, and corals, and of all (other moveable property): but neither the father nor the grandfather is so of the whole immoveable estate."

"Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons."

"They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support: no gift or sale should therefore be made."

"To the lineal descendants, when they appear, of that man, whom the neighbours and old inhabitants know by tradition to be the proprietor, the land must be surrendered by his kinsman."

"Separated kinsmen, as those who are unseparated, are equal in respect of immoveables: for one has not power over the whole, to give, mortgage, or sell it."

Bareilly Court of Appeal,
May 18*th*, 1820.

CASE III.

Q. A person died, leaving a son and a daughter by different wives. The son is insane and dumb, and there is no hope of his recovery. In this case, is the daughter alone entitled to succeed to her father's property, or does it devolve on his maternal grandfather, subject to the condition of his maintaining the son?

There being a son and daughter by different mothers, and the son being insane and dumb, the

R. Under the circumstances stated, in default of his widow, the daughter of the deceased is alone entitled to the succession, to the exclusion of the son. The son's maternal grandfather has no legal claim to any share of

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the property subject to the condition stated, but the son must be supplied with the necessaries of life by his half-sister. daughter is alone entitled to the succession.

Authorities.

Menu :—" Impotent persons and outcastes, persons born blind and deaf, madmen, idiots, the dumb, and those who have lost a sense or a limb, are excluded from a share of the heritage."

Devala :—" On the death of a father or other owner of property, neither an impotent man, nor a person afflicted with elephantiasis, nor a madman, nor an idiot, nor one born blind, nor one degraded for sin, nor the issue of a degraded man, nor a hypocrite or impostor, shall take any share of his heritage. For such men, except those degraded, let food and clothes be provided."

Zillah Burdwan,
July 25th, 1822.

CASE IV.

Q. A man of the *Sudra* tribe had a son and a daughter. The son died during the lifetime of his father, leaving a widow. Afterwards the father died, leaving a daughter, who is mother of male issue, and his son's widow. According to law, is the widow entitled to inherit the property, or the daughter of the deceased proprietor?

A. If the man died leaving no widow, his daughter (who is mother of male issue) is entitled to inherit his entire property, although there is a widow of his son; the widow having no right to her father-in-law's property where his own daughter exists, because the daughter may cause her sons to present the funeral cake to her father, and also to two of his ancestors, but the widow of his son is not competent to fulfil this duty. A daughter excludes a son's widow.

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Authorities.

"The wife and the daughters, also both parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow-student: on failure of the first among these, the next in order is indeed heir to the estate of one who departed for heaven, leaving no male issue." "Even the son of a daughter delivers him in the next world, like the son of a son." These doctrines are laid down in the *Dáyabhága* and other works.

City Dacca,
March 27th, 1815.

CASE V.

Q. If a person die, having two daughters, and subsequently one of them die, leaving two sons and her sister, her surviving; in this case, will the property of the deceased daughter devolve on her sons, or on her sister? What is the law in respect of such property, whether it be divided or undivided?

Of two daughters who succeeded jointly to the paternal property, one dying leaving sons, her share goes to her sister, provided that sister, have or be likely to have a son: otherwise the son of the deceased daughter inherits.

R. Supposing the person to have died leaving two daughters, and subsequently one of them to have died having two sons and a sister, her surviving; and the deceased daughter to have succeeded to the property at the time when she was a maiden, or to have succeeded after her marriage, and afterwards her sister to have become a barren or childless widow, then the deceased daughter's share of the paternal estate will devolve on her sons. If the deceased daughter derived the right to the property after her marriage, and her sister be not a barren or a childless widow, then that sister, she having male issue, or being likely to have such, is entitled to the succession. The property which devolved on the married daughter by right of inheritance, goes at her death to her father's next heir. Of the father's heirs, in default of an heir down to the widow, his daughter is first in rank.

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The property, whether it be divided or undivided, and whether after partition the family be reunited or not reunited, will, according to the law as current in Bengal, devolve on the next heir. This opinion is conformable to the *Dáyabhága*, commentary of *Sricrishna Tarcálancára* on the *Dáyabhága*, *Dáyacramasangraha*, *Vivádárnavasetu*, *Vivádabhangárnava*, and other authorities current in Bengal.

Authorities.

"In default of the wife, the daughter next succeeds." "The following special rule must be here observed, namely, that if a maiden daughter, in whom the succession has once vested, and who has subsequently married, should die without having borne issue, the married sister who has, and the sister who is likely to have, male issue, inherit together the estate which had so vested in her. It does not become the property of her husband or others, for their right is exclusively to a woman's separate property, *(stridhun.)* But, if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession; and on failure of either of them, the other takes the heritage. In default of daughters having, and daughters likely to have, male issue, daughters who are barren, or widows destitute of male issue, or incompetent to take the inheritance, because they cannot benefit the deceased owner, by offering (through the medium of sons) the funeral oblation at solemn obsequies. In default of all daughters (who are entitled to succeed), the daughter's son takes the inheritance." This is laid down in the *Dáyacramasangraha*, *Vivádárnavasetu*, and other authorities.

"In like manner, if the succession have devolved on a daughter, those persons who would have been heirs of her father's property, in her default, (as her son, her paternal

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grandfather, &c.) take the succession on her death; not the heirs to the daughters' property (as her daughter's son," &c.) This is cited in the *Dáyabhága.*

Sudder Dewanny Adawlut.

CASE VI.

Q. The proprietor of an ancestral landed estate died, leaving a widow and a daughter him surviving. Subsequently to his death, his widow took possession of the property by right of inheritance, and then she died, leaving the daughter before mentioned, who was a childless widow, and a son of her husband's paternal uncle. Now these two survivors claim the inheritance; in this case, which of them is entitled to it, or are they both, and if so, in what proportions?

Property which had devolved on a widow at her husband's death, goes, when she dies, to the son of her husband's paternal uncle, to the exclusion of her childless widowed daughter.

R. Under the circumstances above stated, according to law, the succession devolves on the son of the paternal uncle, by whom the childless widowed daughter is excluded; but she is entitled to receive food and raiment from the son of the paternal uncle of the proprietor. This opinion is conformable to the *Dáyabhága* and other works of law.

Dacca Court of Appeal,
February 6*th*, 1808.

CASE VII.

Q. There were four brothers of the whole blood, who jointly held a paternal landed estate. Two of them are still living, and the other two died, one leaving two sons, and the other a maiden daughter. In this case, is the daughter entitled to any share of the property, and if so, what proportion will devolve on her?

According to the law of Benares, a man's daughter, the family being joint, is only entitled

R. Supposing the maiden daughter to have no other near relation living, except her uncles, and uncles' sons, then they (her uncles, and uncles' sons) are bound to dispose of her in marriage. If the daughter's deceased father

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have not separated his portion of the paternal estate from that of his coparceners, then they are bound to supply the necessary expenses attendant on her marriage, out of the produce of the joint estate. The daughter cannot inherit the legal share of her deceased father. This opinion is consonant to the law, as propounded by *Yájnyawalcya*, *Vishnu*, and other sages.*

to maintenance from her uncles and their sons, who succeed to her exclusion.

Zillah Alligurh,
June 2d, 1819.

CASE VIII.

Q. 1. A man died, leaving a widow (A), and a daughter (B), who had two sons, (C and D), of whom the former died before his mother, leaving a widow, but no issue. In this case, has the widow of C, either during the lifetime of B, or on her death, any right to the property left by the original proprietor? Or on the death of B, will the property devolve on D, or on his heirs, while C's widow is living?

R. 1. At the death of the original proprietor, who left no heir down to a great-grandson, his widow was entitled to his property; and at her death, her daughter, B, had the right of inheritance, her son's (C's) widow having no right of succession; as her husband's property over his maternal

The claimants being a daughter or daughter's son, and the widow of a daughter's son, the latter will be excluded, and the two first will inherit, in succession.

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* According to the law, as received in the school of Benares, the undivided brother's female heirs are excluded by his male coparceners, as will appear from the subjoined extracts from the *Mitácsharú:* —" The wife shall take the estate, regards the widow of a separated brother." Page 327. " Therefore it is a settled rule, that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue." Page 340. But according to the law as prevalent in Bengal, the union of the family is no bar to the succession of the female heir.

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grandfather's property could not have accrued during the lifetime of his mother; but on the death of B, her son, D, is entitled to inherit the whole property of his maternal grandfather; and on his death, his heirs will take it, to the exclusion of C's widow. This opinion is conformable to the *Dáyabhága*, *Vivádabhangárnava*, and other authorities.

Authorities.

The texts of *Yájnyawalcya* and *Vishnu*: "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow student," &c., &c. "The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters."

Q. 2. On the death of the original proprietor, his widow made a gift of his entire property to her two grandsons, C and D, while their mother, that is, the daughter (B) was living. In this case is the gift binding and good?

R. 2. Supposing the widow, during the lifetime of her daughter B, to have made a gift of the whole property of her husband which devolved on her at his death by law of inheritance, without the express consent of her daughter, to her two grandsons, the gift is illegal, as it is a settled rule, that the widow has only the right to enjoy her husband's property with moderation until her death. This is consonant to the doctrines cited in the *Dáyabhága* and other law tracts.

Authorities.

Cátyáyana: "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

"Thus in the *Mahabhárata*, in the Chapter entitled *Dánadharma*, it is said: "For women, the heritage of

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their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth."

Zillah Nuddea,
March 8th, 1823.

C'shamuncuree Dossea *v.* Anundchunder Goopta.

CASE IX.

Q. Is a daughter's son entitled to inherit the estate of his maternal grandfather, while a childless widowed daughter of that ancestor exists?

R. The daughter's son is alone entitled to succeed his maternal grandfather, even though his daughter who is a childless widow is living, she being excluded by reason of her having neither husband nor issue.

A daughter's son excludes a daughter, being a childless widow.

Authorities.

The text of *Vrihaspati,* cited in the *Dáyabhága* and other legal authorities: "As the ownership of her father's wealth devolves on her, although kindred exists; so her son likewise is acknowledged to be heir to his maternal grandfather's estate."

Menu: "The maternal grandfather becomes in law the father of a son: let that son give the funeral cake, and possess the inheritance."*

The true meaning of the preceding passage is, "that in default of daughters having, and daughters likely to have male issue, daughters who are barren, or widows destitute of male issue, are incompetent to take the inheritance, because they cannot benefit the deceased owner by offering

* Last stanza, *Menu,* IX, 136.

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(through the medium of sons) the funeral oblation at solemn obsequies."

Zillah Hooghly, }
July 1st, 1822. }

CASE X.

Q. Three individuals (being uterine brothers) live together, enjoying their patrimonial property as an undivided family. The elder brother dies, leaving a wife and daughter him surviving. The second brother dies, leaving a son. The younger brother dies also, leaving a wife and son. On the death of the elder brother, his widow continued to live with her husband's second and younger brothers, exclusively enjoying her portion of the property. She subsequently died, leaving her daughter, and that daughter's son. Afterwards the daughter died, leaving her son. In this case, does the estate of the elder brother devolve on his daughter's son, or on his nephews—in other words, the sons of his second and younger brothers?

A daughter's son excludes brother's sons.

A. Under these circumstances, the estate of the eldest brother will be inherited by his daughter's son, and not by his second and younger brother's sons. This opinion is conformable to law.*

Zillah Tipperah, }
June 27th, 1815. }

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* This exposition of the law is correct, as far as regards the doctrine of the Bengal school. It would have been different, had the question occurred elsewhere; see case 7. See also the case of Jugmohun Mookerjea and another *versus* Punchanund and another, Sudder Dewanny Adawlut Reports, Vol. iv, p. 67, in which the estate of a Hindu was awarded to the sons of his daughters, in preference to the grandsons by lineal descent in the male line of his full brother.

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CASE XI.

Q. A man dying, and leaving a brother's widow and son, and a daughter's son, (the whole family being joint and undivided,) have the two former any right to participate in the property of the deceased, notwithstanding the existence of the latter, he being in a state of minority?

A daughter's son excludes a brother's widow and his son.

R. On failure of heirs down to the daughters, the grandson of the deceased in the female line is alone entitled to the succession, to the entire exclusion of the brother's widow and son, even though they lived with the minor as a joint and united family. The estate to which the minor is entitled by inheritance will be managed by his nearest of kin during his minority.

Authorities.

"The wife and the daughters, also both parents, brothers likewise." The term daughters implies both the daughters and their sons.

Dacca Court of Appeal,
August 20th, 1819.

CASE XII.

Q. A person had two sons by different wives. His younger son died, leaving a widow, both parents, and his half brother (who was older than himself) him surviving; subsequently to his death, the father died; and the eldest son took possession of all the moveable and immoveable property which he left. Some time afterwards, this son died, leaving his step-mother, a daughter's son, and the widow of his half brother. The widow of the brother who died last became possessed of all the property which had devolved on her husband, and soon after died, leaving two claimants to the estate; namely, her own grandson in the female line, and the widow of the first deceased (being the

On the death of a widow, the property held by her goes to her husband's daughter's son, to the exclusion of her hus-

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band's brother's widow, but the latter is entitled to maintenance.

younger son) still living. In this case, according to law, does the estate devolve on the daughter's son of the eldest son, or on the widow of the younger one?

R. In default of heirs down to daughters having, and daughters likely to have male issue, the daughter's son is entitled to the succession. The widow whose husband died during the lifetime of his father, has no right to take the inheritance on the death of her husband's half brother's widow, but her maintenance rests with the grandson of the eldest son.

Zillah Burdwan,
August 19*th*, 1823.

CASE XIII.

Where the family is separated, the daughter's son takes the estate, to the exclusion of the uncle and uncle's son.

Q. A person of the *Kayustha* or *Cait* class, was survived by his three sons, A, B and C, who took possession of their father's estate, consisting of thirty-seven *beegahs* and ten *biswas* of land; subsequently the eldest son (A) died, leaving a son who was in the enjoyment of his father's share; and then the second son (B) died, leaving a son. The third son (C) is still living. The son of the eldest son died, leaving a daughter, and her two sons. These two grandsons claim one-third of the estate, being their maternal grandfather's legal share, but their mother is still living. Under these circumstances, supposing the eldest brother's son to have enjoyed the property without having come to any division of it with his two uncles, on the death of such eldest brother's son, will his property devolve on his uncle, C, on his other uncle's (B's) son, or on his own daughter, or on his daughter's sons whose mother still survives? Supposing the property to have been divided, and that they lived apart, in this case, should that portion which the eldest brother's son possessed, devolve on his daughter or daughter's sons, or on any, and what other person? and generally, whether the eldest brother's son lived together or apart

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from his uncles, and died leaving the individuals above specified, what is the law as to their respective rights of succession?

R. The order of the heirs of a separated and not reunited individual is thus laid down by *Yájnyawalcya*: "The wife and the daughters, also both parents, brothers, &c. This rule extends to all persons and classes."*

The estate of a person deceased, who was separated from his coparceners, and not reunited with them, first goes to his widow; in default of her, to the daughter, as *Cátyáyana* says: "Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, let the daughter inherit, if unmarried."

So *Vrihaspati*: "The wife is pronounced successor to the wealth of her husband; and, in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth." On that subject *Menu*, says: "The son of a man is even as himself; and the daughter is equal to the son: how then can any other inherit his property, notwithstanding the survival of her, who is as it were himself."

By the import of the particle "also," the daughter's son succeeds to the estate, on failure of daughters. "If a man leave neither son, nor son's son, nor wife, nor (female) issue, the daughter's son shall take his wealth. For, in regard to the obsequies of ancestors, daughters' sons are considered as sons' sons."

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* It would have been *vice versâ* according to the law of Benares, had the family been joint and undivided.

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"By that male child, whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son: let that son give the funeral oblation, and possess the inheritance."

On failure of these heirs, the mother* takes the inheritance; in default of her, the father is successor; the uterine

* According to the doctrine of *Jimútavahana* and others, whose works are current in Bengal, the mother's right of succession is admitted after the father. *Jimútavahana* says, that "in the term *pitarau*," both parents, (contained in the text of *Yájnyawalcya*, vide *Dáyabhága*, page 160,) "the priority of the father is indicated: for the father is first suggested by the radical term *pitri*; and afterwards the mother is inferred from the dual number, by assuming, that one term (of two which composed the phrase) is retained." But the followers of the schools of Benares and Mithila give the mother the preference over the father, as will more clearly appear from the subjoined extract containing the doctrine on this subject of the *Mitácshará*, with Mr. Colebrooke's remarks. "Therefore, since the mother is the nearest of the two parents, it is most fit that she should take the estate. But, on failure of her, the father is successor to the property." "The commentator, *Balambhata*, is of opinion, that the father should inherit first, and afterwards the mother; upon the analogy of more distant kindred, where the paternal line has invariably the preference before the maternal kindred; and upon the authority of several passages of law, *Nandapandita*, author of commentaries on the *Mitácshará*, and on the institutes of *Vishnu*, had before maintained the same opinion. But the elder commentator of the *Mitácshará*; *Vishweshwarabhatta*, has in this instance followed the text of his author in his own treatise entitled *Madanapárijata*, and has supported *Vijnyaneswara's* argument, both there and in his commentary named *Subodhini*. Much diversity of opinion does indeed prevail on this question. *Sricara* maintains, that the father and mother inherit together: and the great majority of writers of eminence (as *Aparárca* and *Kamalacara*, and the authors of the *Smritichandricá*, *Madanaratna*, *Vyavahâramayúc'ha*, &c.) gives the father the preference before the mother. *Jimútavahana* and *Raghunandana* have adopted this doctrine. But *Váchaspatimisra*, on the contrary, concurs with the *Mitácshará* in placing the mother before the father; being guided by an erroneous reading of the text of *Vishnu*,

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brother takes the heritage at the father's death; in default of a brother of the whole blood, the half brother becomes heir.

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as is remarked in the *Veeramitrodaya*. The author of the latter work proposes to reconcile these contradictions by a personal distinction. If the mother be individually more venerable than the father, she inherits; if she be less so, the father takes the inheritance."

The following is an extract from the *Vivádabhangárnava:* "More arguments might be brought to prove the pre-eminence of the mother; for example, her importance declared in an authoritative text: "A mother surpasses a thousand fathers, for she bears and nourishes the child in the womb; therefore is a mother most venerable."

"If the veneration due to her exceed the respect due to a father a thousand-fold, how can the text cited from the *Purana* by *Mádhavácharjya* be relevant?"

"By law, the father and the mother are two reverend parents of a man in this world; however adorable *the goddess of* the earth, a mother is *still* more venerable. But, of these two, the father is pre-eminent, because the seed is chiefly considered; on failure of him, the mother is *most revered;* after her, the eldest brother."

"He himself thus reconciles the seeming contradiction: this relates to a father, *who gives instruction to his son in the whole Veda*, after performing the ceremonies on conception, and all other holy rites which perfect the twice-born man: otherwise the mother is most venerable. Accordingly, the text of *Menu* is also pertinent."

Menu: "A mere *achárjya*, or a teacher of the *gayatri only*, surpasses ten *upadhyas;* a father, a hundred such *achárjyas;* and a mother a thousand natural fathers."

Vyása: "Ten months a mother bore her infant in her womb, suffering extreme anguish; fainting with travail and various pangs, she brought forth her child; loving her sons more than her life, the tender mother is *justly* revered; who could recite all her merits, even though he spoke a hundred years?"

"By citing other texts from the *Puránas*, the volume would be unnecessarily swelled; for this reason they are omitted. The seeming difficulty is thus reconciled: Title to respect is no cause of inheritance; were it so, who could take the estate, while both parents exist? But benefits conferred by his own act, and near relation by the funeral cake, *are the grounds on which rests the claim of an heir.* Now the father is superior by the benefits which he confers: therefore he has the right of succession, even though the mother be living."

But although a great majority of writers gives the father the preference over the mother, yet according to the law as current in Benares and Mithila, the mother has the superior claim of inheritance.

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Menu: "Of a son dying childless, *and leaving no widow,* the *father* and mother shall take the estate: and the mother also being dead, the paternal *grandfather* and grandmother shall take the heritage, *on failure of brothers and nephews.*"

To the nearest kinsman *(sapinda)* the inheritance next belongs.

Among the *sapindas,* he who is nearest is entitled to succession, and he who is remote is excluded by the nearest: such is the meaning of the text.

Accordingly, *Vrihaspati* says: "Where many claim the inheritance of a childless man, either paternal or maternal, of more distant kinsmen, he who is the nearest shall take the estate."

According to the preceding passages of *Menu, Vishnu, Vrihaspati, Cátyáyana,* and *Yájnyawalcya,* it is determined that supposing the eldest brother's son to have separated from his uncles, and not to have been reunited, his estate will go first to his daughter, and, in default of her, his grandsons in the female line will take the inheritance; but, if the property was held in joint tenancy, or if he, after separation, became reunited with his paternal relations, then his property would devolve on his uncle and uncle's son, because they are his *sagotras* and *sapindas.*

This opinion is conformable to the *Mitácshará* and *Vyavahdramayúc'ha.*

Bareilly Court of Appeal.

CASE XIV.

Q. A *Brahmin* died, leaving two sons, a daughter, and a daughter's son. Subsequently his eldest son died without

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male issue, and then the younger, leaving a widow and a daughter, who are since deceased; but the latter at her death left an unmarried daughter and her own husband, who is the defendant in this case. Now the original proprietor's grandson by the female side claims the property which devolved on the younger brother's daughter. In this case, will the property in question devolve on the original proprietor's daughter's son, or on the husband of the younger brother's daughter?

R. Under the circumstances stated, the property which the younger son's daughter inherited from her father will go to the original proprietor's daughter's son, to the entire exclusion of her husband and daughter, because the grandson confers more benefit on the deceased. Any property which is her own *peculium*, her own heirs will take. This is consonant to the *Dáyabhága.*

Ancestral property inherited by a daughter will at her death go to her father's relations, to the exclusion of her husband and daughter.

Zillah Hooghly,
February 28th, 1817.

CASE XV.

Q. A person brought an action, claiming his maternal grandfather's property, while his mother was living, and there was a possibility of her bearing more children. In this case, was the grandson entitled to a judgment for the property?

R. The plaintiff's mother has exclusive right to the property claimed; consequently the plaintiff cannot be considered in the light of an heir to the deceased, so long as his mother survives.

A man cannot claim his maternal grandfather's property, while his mother is living.

Zillah 24-Pergunnahs.

CASE XVI.

Q. A landed proprietor died, leaving two widows and two daughters by different wives. Some time after the

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widows died, and on their death the first wife's daughter who is a childless widow, and the second wife's daughter who is mother of two sons, jointly possessed the estate, and equally shared the produce of it. The daughter who is a childless widow, disposed of a moiety of the estate by a deed of gift in favour of her own spiritual teacher (*gooroo*), for the benefit of her deceased father. In this case, has the deed of gift validity or otherwise?

A childless widowed daughter is excluded by a daughter who has made issue.

R. Under the circumstances stated, the childless widowed daughter has no right to any part of the paternal estate, even though she enjoyed the moiety of its produce; consequently, the gift, which was made without the sanction of her half-sister and her sons, is illegal. This is conformable to the *Dáyabhága* and other legal authorities.

Authorities.

"Therefore the doctrine should be respected, which *Dicshita* maintains; namely, that a daughter, who is mother of male issue, or who is likely to become so, is competent to inherit; not one who is a widow, or is barren, or fails in bringing male issue, as bearing none but daughters, or from some other cause."—The *Dáyabhága.*

"The doctrine maintained by *Dicshita,* and respected by the author of the *Dáyabhága,* namely, that in default of daughters having, and daughters likely to have male issue, daughters who are barren, or widows destitute of male issue, are incompetent to take the inheritance, because they cannot benefit the deceased owner by offering (through the medium of sons) the funeral oblation at solemn obsequies, should be understood."—The *Dáyacramasangraha.*

Calcutta Court of Appeal.

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SECTION IV.

Of Parents, &c.

CASE I.

Q. A minor dies, leaving his mother and four paternal uncles him surviving, and some property, which was joint and unseparated from that of his uncles. In this case, of these individuals, on whom does his share of the undivided estate devolve? If, according to law, the mother has a life-interest in it, is she entitled to obtain the value of a wall of his dwelling house, usurped by one of her husband's brothers?

In Bengal, a mother inherits joint property, to the exclusion of a paternal uncle.

R. Supposing the minor to die, leaving no heirs down to the father, his mother will take the entire estate, whether consisting of moveables or immoveables; and where there is a mother living, the paternal uncles have no title to the inheritance. The uncle who has taken possession of the wall, which was in common, is to pay the value of the deceased's portion thereof to the mother, as she is the sole heir of her son.

Authorities.

Yájnyawalcya says: "The wife and the daughters, also both parents," &c.

Vrihaspati says: "Of a deceased son, who leaves neither wife nor male issue, the mother must be considered as heir: or by her consent, the brother may inherit."

Zillah Nuddea.

Unnapoorna Dibia *versus* Ramjya Mookherjya.

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CASE II.

Q. 1. A person had three sons by his two wives. On the death of the second son, who was unmarried, the father divided his real and personal property between his surviving sons in equal portions. The two brothers separated from each other during the father's liftetime, and enjoyed their respective shares of the property. Shortly after, the eldest son died, leaving a widow and two sons, one of whom did not long survive. At the death of the original proprietor, he left his second son, and his eldest son's widow and son, him surviving. The widow of the eldest son, together with her son, took possession of his share; and lastly her son, (that is, the grandson of the original proprietor,) died, and after his death also the widow continued in possession for some time of the share which had belonged to her husband; but now the younger son of the original proprietor is desirous of ousting the widow of the eldest son, and they are contesting about the property. Supposing the fact of the adjustment of the shares, and the partition of the property to have been made as specified, in this case, how will the estate of the original proprietor be distributed among the parties, that is, the younger son of the proprietor, and his eldest son's widow?

And divided property universally.

R. 1. If it be proved that the original proprietor made the partition of his estate as specified, then his younger son and his grandson's mother, (the widow of his eldest son,) are respectively entitled to the portions which he assigned to his sons.

Q. 2. Supposing the original proprietor to have had three sons by two wives, the second son to have died unmarried before his father, the eldest son to have died also before his father, leaving a widow and two sons, (one of whom subsequently died,) and then the original proprietor, without having

made any division of his property, to have died before his younger son, and his eldest son's widow and son (who is since dead;) in this case, of the survivors, that is, the younger son of the original proprietor, and his eldest son's widow, which is entitled to inherit his property; and if both, to what proportion is each of them entitled?

R. 2. On the death of the original proprietor, his son and grandson were entitled to inherit in equal portions, and on the death of such grandson, leaving no heir down to the father, the mother is successor; consequently the property left by the original proprietor will devolve both on his younger son and his eldest son's widow in equal shares.

In succession to her son, who shared his grandfather's estate equally with his uncle.

Calcutta Court of Appeal,
July 22nd, 1805.

Deveepershad Chatoorjya *v.* Sava Dasee Dibia.

CASE III.

Q. After the death of Rutunmala, first widow of Kishenkishore, and of Nundkishore, the son adopted by her, without issue, who was heir to the two anna share left by them? Was it the appellant, Narainee Dibia, second widow of Kishenkishore? or Ramkishore, the son adopted by her, if he be really so? or the heirs of Kishengopal Rai, full brother of Kishenkishore? or the heirs of Gunganarain and Lukhinarain, half brothers of Kishenkishore? and does the case turn at all on the legality or illegality of the adoption of Ramkishore by the appellant, Narainee Dibia?

The following is a sketch of the family.

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SRIKISHEN,

Zemindar of *pergunnah* Mymunsingh, &c. left four sons, the first and second by one wife, the third and fourth by another.

1st.	2nd.	3rd.	4th.
KISHENKISHORE, *zemindar* of 4 annas in dispute, died in 1171, without issue, leaving two widows, viz., 1. Rutunmala, who died in 1191, after adopting Nundkishore; 2, Narainee Dibia (the plaintiff), who states that she adopted Ramkishore after Nundkishore's death.	KISHENGOPAL had no issue, but adopted Joogulkishore, the father of Hurkishore (the defendant).	GUNGANARAIN.	LUKHINARAIN left two sons, viz., Shamchunder and Roodurchunder.

A step-mother has no right of succession according to the law of Bengal, and the property of her step-son will rather go to his uncle's adopted son.

R. If after the death of Rutunmala, first widow of Kishenkishore, her adopted son Nundkishore, adopted under due authority from her husband, died without issue, Nunkishore's two annas go to the adopted son of Kishengopal, full brother of Kishenkishore, (that is, to the cousin-german by adoption;) not to the second widow of Kishenkishore, (step-mother by adoption); nor to the heirs of Gunganarain and Lukhinarain, (half brothers of the adopting father.) If however, the adoption of Ramkishore by Narainee Dibia (the appellant) be a good adoption, then Ramkishore is heir to the two annas of Nundkishore. In the *Shasters*, there is no express prohibition, or sanction, of two adoptions: if it be the usage in Bengal to make two adoptions, the adoption of Ramkishore is no doubt valid: and he succeeds to the two annas, as before stated. The reason why the step-mother of Nundkishore, that is, Narainee, the appellant, cannot succeed to his share, is, that in the *Dáya-bhága*, and other authorities current in Bengal, wherever the word *mata*, or mother, occurs, it is explained to intend *jananee*, or actual mother. These books do not authorise

the step-mother's succession. But she should receive a maintenance from the person who takes the inheritance. In the books of the Dekhun, viz., the *Mitácshará*, &c. the word *mata* implies both mother and step-mother: according to these, the step-mother would share.

Authorities.

Menu: " The son begotten by a man himself *in lawful wedlock,* the son of his wife begotten *in the manner before* mentioned, a son given *to him,* a son made *or adopted,* a son of concealed birth, *or whose real father cannot be known,* and a son rejected *by his natural parents,* are the six kinsmen and heirs." " Of the man to whom a son has been given, *according to a subsequent law,* adorned with every virtue, that son shall take *a fifth or sixth part of* the heritage, though brought from a different family."

Baudháyana: " Participation of wealth belongs to the son begotten by a man himself *in lawful wedlock,* the son of his appointed daughter, the son begotten on his wife *by a kinsman* legally *appointed,* a son given, a son made *by adoption,* a son of concealed birth, and a son rejected *by his natural parents.*"

Gótama: " The son begotten by a man himself *in lawful wedlock,* the son of a wife *begotten by an appointed kinsman,* a son given, a son made by adoption, a son of concealed birth, and one rejected by his natural parents, are sons who inherit property."—*Yájnyawalcya.*

Menu: " Of a son dying childless, (and leaving no widow,) the mother shall take the estate; and, the mother also being dead, the father's mother shall take the heritage."

The term " mother" mentioned in the texts (above alluded to) intends 'natural mother,' for the terms " mother,"

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grandmother, and great-grandmother, &c. (in such texts as the following) bear their original sense of 'his own natural mother,' 'father's natural mother,' and 'grandfather's natural mother;' and it is by those terms that they are described as taking their places at the funeral repast. But the introduction of step-mothers and the rest to a place at the periodical obsequies, is expressly forbidden. Thus the sage declares, "Whosoever dies, whether man or woman, without male issue, for such person shall be performed funeral rites peculiar to the individual, but no periodical obsequies." —The *Dáyabhága.**

Narainee Dibia *v.* Hurkishore Rai.

Sudder Dewanny Adawlut, *December* 24*th*, 1801.

CASE IV.

Q. A minor dies, leaving his sister, his paternal uncles, and his father's mother. In this case, according to law, which of these individuals is entitled to succeed him by right of inheritance?

A paternal grandmother excludes a sister and uncles.

R. His paternal grandmother is exclusively entitled to the succession. The sister and the uncles are excluded by her. To this effect is the text of *Menu* cited in the *Dáyabhága* and other authorities: "Of a son dying childless (and leaving no widow), the mother shall take the estate; and the mother also being dead, the father's mother shall take the heritage."†

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* It is not by any means clear, that in other places than Bengal a step-mother has the right to succeed to property. Indeed, although this might be inferred from the opinion of the Pundits above given, the reverse may be assumed as the fact. See note to S. D. A. Reports, vol. i, p. 42. At a partition, she would, according to the law of Benares, come in for a share.

† This is agreeable to the law of Bengal, according to the order adopted by *Sricrishna* in the *Dáyacramasangraha*, which is universally

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CASE IV.

Q. A *Brahmin* died, leaving a widow and two sons. In this case, is the widow entitled to any share of the property left by her deceased husband: if so, to what portion? She having disposed of her share to one of the sons while there were two widows of the other son living, has the gift validity or otherwise?

R. Under the circumstances above mentioned, the widow is entitled to one-third of her husband's property. If she, having succeeded thereto, bestowed her share on one son, while the other son's two widows were alive, the gift must be considered good and valid.*

A mother is entitled to a share equal to that of one of her sons, and she may give that share to her only son. See note.

Dacca Court of Appeal, September 8th, 1805.

admitted to be the most eminent authority in that province; but according to his commentary on the *Dáyabhága*, the paternal uncle is stated to have a preferable claim to that of the paternal grandmother.

* It is not distinctly mentioned in this case, whether the widow was the mother of both those sons, or of one only, or was childless. If she was mother of both sons, and did not receive any fortune as her separate property from her husband or father-in-law, she is entitled to a share equal to that of one of her sons; but if separate property had been bestowed on her, she is entitled to a moiety only, as is expressed by *Jimútavahana:* "When partition is made by brethren of the whole blood, after the demise of the father, an equal share must be given to the mother. The equal partition of the mother with the brethren takes effect, if no separate property had been given to the woman. But if any have been given, she has half (a share)." If she had only one son, or was childless, she had no right of succession; for in the former case, her only son would provide her with the necessaries of life, and in the latter she would be entitled only to maintenance out of her husband's property, as is declared by *Sricrishna Tarcálancara,* in his work called the *Dáyacramasangraha:* "The stepmother does not participate, but she must be maintained with food and raiment." The mother, moreover, has no power to compel her sons to surrender her a share, if they intend to live together as an undivided and united family; for there is no provision in the *Dáya-bhága* or other legal authority, that partition of the paternal estate can be made by the choice of a mother, as it takes place by the will of any one of the co-heirs.

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SECTION V.

Of Brothers, their Sons, &c.

CASE I.

Q. 1. A person had two wives; by his first wife he had two sons, and by the second one son. After the father's death, all the brothers lived together as an undivided family, and jointly possessed the paternal estate. One of the sons by the first wife died, leaving a widow, who is since dead. Subsequently to her death, the other son by the first wife, and lastly the son by the second wife died, each leaving a widow. In this case, it is presumed the property will be made into three shares, of which two will go to the widow of the son by the first wife, and the remaining one to the widow of the son by the second wife. Is this the proper distribution according to law?

Half brothers share equally with whole brothers, if undivided.

R. 1. If the original proprietor had three sons by two different wives, as mentioned in the question, and the son whose widow is dead, died while they were living together as an undivided and joint family; in this case, the uterine and half brothers should have succeeded in equal shares to the property left by their deceased brother. On their death, their widows are entitled to the succession.

Q. 2. Should it be proved, that the three brothers divided the estate among themselves, and died one after another, as mentioned in the preceding question, in this case is there any particular rule for the widows' succession?

R. 2. Supposing the brothers to have made partition of their paternal estate, and to have taken possession of their respective shares, and subsequently one of the sons by the first wife to have died, leaving no widow, his brother of the whole blood is exclusively entitled to his share. On his death, his widow is entitled to two shares, that is to say, to the one which was her husband's original legal share, and to the other which devolved on him from his uterine brother. The widow of the son by the second wife is only entitled to the share of which her husband died seized. But are excluded by a whole brother, if separated.

March 13th, 1820.

CASE II.

Q. A *Sudra* family consisted of three brothers, the eldest of whom died leaving two sons, the second a widow, and the youngest three sons. The youngest son of the eldest brother died leaving a son, and then the widow of the second brother. Now all of the survivors above mentioned claim a share of the widow's estate. In this case, are they all entitled to the succession; and if so, what is the extent of their respective shares?

R. On the death of the widow of the second brother, the property left by her will be equally shared by all the sons of her husband's brothers. The grandson of her husband's eldest brother is excluded by them. A brother's son excludes a brother's grandson.

City of Dacca.

CASE III.

Q. A *Brahmin* had a family by his two wives; by the senior wife he had a son and three daughters, and by the junior four sons and two daughters. The father during his lifetime made a partition of his property, and assigned five equal portions to his five daughters, and five to his five sons, and died. All the sons and daughters took possession of their respective shares of the paternal estate. The four

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sons by the younger wife died, leaving no male issue, and their mother enjoyed her sons' shares of the property, and died. Now there are the original proprietor's grandson by his senior wife, and a daughter by his junior wife, living. In this case, which of the survivors is entitled to succeed to the proportions which belonged to the original proprietor's four deceased sons by his junior wife, and which devolved on their mother by right of inheritance?

Ancestral property derived to a woman from her son, will at her death go to his half brother's son, to the exclusion of his sister.

R. 1. Supposing the *Brahmin* to have divided his real and personal estate among his children, viz., a son by his elder wife, and four sons by the younger one, and five daughters, and the sons to have enjoyed their respective shares, and the four sons by the younger wife to have died, leaving no heirs down to daughters' sons, their mother was entitled to their assets. If at the mother's death, their uterine sister and half brother's son were living, then their half brother's son is entitled to the succession, provided there be no heir down to the whole brother's son existing, and the sister is excluded from participation.

Q. 2. Supposing the daughter of the younger wife to have borne a son, in this case, is the daughter's son entitled to inherit from his uncles?

And sister's son.

R. 2. Where a sister's son and a son of the half brother are living, the former has no right of inheritance.

Zillah 24-Pergunnahs,
December 20th, 1816.

CASE IV.

Q. A widow instituted an action claiming her husband's share of the ancestral estate, consisting of lands and other property, against his nephews, who however came to an amicable adjustment with her, having assigned some im-

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moveable property for her maintenance. From that time she continued to live with the daughter of her rival wife, which daughter had a son, since dead. On the death of the widow, her funeral rites were performed by the husband of the daughter of her contemporary wife, and the first anniversary of her death was celebrated by her husband's nephews. In this case, will the property, whether it be her husband's patrimonial or her own, purchased either with the produce of her husband's patrimonial or with her own peculiar property, devolve on her husband's nephews, or on the daughter of the rival wife?

Property derived to a woman from her husband goes at her death to his nephews; but not her peculiar property, which will go, in preference, to her step-daughter.

R. Supposing the childless widow to have received immoveable property out of her husband's patrimonial estate by compromise from his nephews for her maintenance, she would in such property have had only a life-interest. Her property, therefore, with the exception of her peculiar estate, will devolve on her husband's nephew. But the property which she purchased with her subsistence, her jewels, her perquisites, and her gains, is termed her peculiar or separate property, and should devolve on the daughter of the rival wife.

Authorities.

"Her subsistence, her ornaments, her perquisites, and her gains, are the separate property of a woman." *Menu* says: "A woman's separate property goes to her daughter unaffianced, and to those not actually married."

City Patna,
July 4th, 1807.

CASE V.

Q. There were four uterine brothers, who having enjoyed their patrimony in common, died successively, leaving their respective heirs and representatives. The eldest brother having been destitute of male issue, had selected one

of the three sons of his second brother, and adopted him as his son after the mode prescribed by law. Of the remaining two sons of his second brother, one died leaving a son, and the other is alive. The third brother left a widow only as his heir, and the youngest brother had four sons. The heirs of all the brothers enjoyed their respective shares of the property; and the widow of the third brother dying, there are her husband's eldest brother's adopted son, his second brother's son, and son's son, and his youngest brother's four sons surviving. Under such circumstances, in what proportions will these persons respectively be entitled to inherit the estate left by the widow of the third brother?

The claimants to property left by a widow, which had devolved on her at her husband's death, being her husband's brother's son and grandson, another brother's adopted son, and a third brother's four sons, the property will be made into eleven parts, of which the adopted son will take one, and the other brother's five sons two parts each. The grandson will be excluded.

R. If the widow, having succeeded to her husband, (being the third brother,) died leaving his brother's five sons, an adopted son, and a grandson in the male line, according to the law of *Menu*, (who holds the first rank among legislators,) and other authorities, in the enumeration of the twelve descriptions of sons, the adopted son is ranked among the first six, who are heirs to collaterals; and agreeably to the law which is current in this district, an adopted son is entitled to a third share: consequently the property left by the widow of the third brother will be made into eleven parts; of which her husband's brother's five sons will take ten, or two shares each, and the adopted son the remaining one. This is conformable to the law of *Menu*, the *Oodvahatatwa*, *Dáyacramasangraha*, *Vivádárnavasetu*, *Dáyatatwa*, *Dattacamimánsá*, *Dattacachandricá*, commentary on the *Dáyabhága*, and other authorities.

Authorities.

Menu says: "Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, *except to their own father*, but kinsmen. The son begotten by a man himself *in lawful*

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wedlock, the son of his wife begotten *in the manner before mentioned,* a son given to *him,* a son made or *adopted,* a son of concealed birth, *or whose real father cannot be known,* and a son rejected *by his natural parents,* are the six kinsmen and heirs." The text of *Vrihaspati* cited in the *Oodvahatatwa:* "*Menu* holds the first rank among legislators, because he has expressed in his code the *whole* sense of the *Veda:* no code is approved which contradicts the sense of *any law promulgated by Menu.*"

The following is the doctrine laid down in the *Dáyacramasangraha.* "In the partition made between legitimate and adopted sons, the legitimate son has two shares, and the adopted sons, who are of the same class with the father, take one share."

The *Vivádárnavásetu* contains the same reading as above.

The author of the *Dáyatatwa* concurs in the preceding observations, saying: Among these "(the twelve sons of men,) except the son of the body, he who is of an equal class with his adoptive father shall receive one-third of the father's estate, where a son of the body is living."

"A given son, abounding in good qualities *(yat'ha-jata)* existing: should a legitimate son be born at any time: let both be equal sharers of the father's whole estate." That must be construed, as supposing the former possessed of good qualities, and the legitimate son destitute of the same: on account of the epithet "*yat'ha-jata* (abounding in good qualities)." He in whom there is a '*jata,*' that is, an assemblage *(samuha)* of good qualities. This is the meaning; for the term '*yat'ha*' is significant of similitude, depending on quality." This is laid down in the *Dattacamimánsá.*

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"Of the man to whom a son has been given, adorned with every quality, that son shall take the heritage, though brought from a different family." "With every quality, "class, science, observance of duties." This is the doctrine contained in the *Dattacachandricá.*

It appears from the commentary on the *Dáyabhága*, the *Dáyacramasangraha, Vivádárnavasetu,* and other law books, that only in default of a brother's son, his grandson in the male line is entitled to the succession.

Calcutta Court of Appeal.

CASE VI.

Q. 1. Of five uterine brothers, the eldest, after a general partition, lived together with his second brother, and died childless. In this case, does the property left by the eldest brother devolve only on the son of his associated (second) brother, or on all the sons of his brothers?

The son of a reunited brother succeeds as heir, to the exclusion of all the sons of unassociated brethren.

R. 1. If, of the separated brothers, two lived together, through mutual affection, as reunited in food and family, and one of such associated brothers died, leaving no nearer heirs, as son, and so forth, his property should devolve on his reunited brother only, on whose death his son is alone entitled to the succession. The sons of the unassociated brothers have no title thereto.

Authorities.

The text of *Yájnyawalcya*, cited in the *Dáyabhága* and other works of law: "A reunited (brother) shall keep the share of his reunited (co-heir), who is deceased; or shall deliver it to a son subsequently born." The term reunion is explained by *Vrihaspati*: "He who being once separated, dwells again, through affection, with his father, brother, or paternal uncle, is termed reunited."

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Q. 2. Should the five brothers, having been separated, have all lived apart, and one of them have died leaving no male issue, in such case, on whom does his property devolve?

R. 2. In default of heirs down to the mother, his brothers of the whole blood are equally entitled to the succession. The authorities are laid down in the *Dáyabhága*, &c. **A brother inherits next to a mother.**

Authorities.

Devala:—"Next let brothers of the whole blood divide the heritage of him who leaves no male issue." *Yájnyawalcya*: "But an uterine brother shall thus retain or deliver the allotment of his uterine relation."

Menu:—"Of him who leaves no son, the father shall take the inheritance; or the brothers."

Zillah Hooghly,
December 18*th*, 1820.

CASE VII.

Q. Of four uterine brothers, who lived together and enjoyed the profits of their paternal and acquired estates as an united family, two died before partition, leaving their widows. Subsequently to their death, the surviving brothers voluntarily selected an arbitrator to divide the estate between the parties. He (the arbitrator) adjudged, that the property should be made into four shares, of which two should be taken by the brothers, and the remaining two by the widows, whose shares were to be entrusted to the management of their husbands' brothers, from whom they were to receive the produce during their lives. The parties consented to this award, and acted upon it for some time. Subsequently one of the brothers died, leaving a widow and two sons under age. One of the widows, whose husband's share had been entrusted to her husband's deceased brother, died, and lastly the surviving brother

died, leaving sons. Under these circumstances, which of these survivors is entitled to succeed to the deceased widow's property, which devolved on her in virtue of inheritance, from her husband?

On the death of a widow, her property will go to the sons of her husband's brother who survived, to the exclusion of the sons of his brother who died before her.

R. Under the circumstances above stated, the widow's share (that is, one-fourth of the property as awarded by the arbitrator) should have devolved on her husband's brother, who survived her, and on his death it should go to his sons. The other survivors are excluded from the inheritance.

Authorities.

Yájnyawalcya:—"The wife, the daughters, also both parents, brothers likewise and their sons."

This doctrine is conformable to the law as expounded in the *Dáyabhága*, &c.

Calcutta Court of Appeal,
May 6th, 1819.

CASE VIII.

Q. There were three brothers, A, B and C, who, having made a partition among themselves of their landed and other property, continued to live apart as a divided family. B had three sons, D, E and F, of whom the eldest, (D), died, leaving an adopted son; the youngest, (F), leaving no heir down to the wife, and the second, (E), leaving a widow. The widow had enjoyed her husband's share, and died. Now D's adopted son, A's grandson, and C's sons are living, and claim the property left by E's widow. Under such circumstances, which of these claimants has a legal right to the succession?

The adopted son of a brother excludes

R. Under the circumstances above stated, the widow's husband's uterine brother's adopted son is exclusively

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entitled to the inheritance, by reason of his conferring benefits by presenting oblations to the manes of her husband's mother, father, and grandfather. Her husband's two uncles' sons and grandson are excluded by his uterine brother's adopted son. the son and grandson of an uncle.

Dacca Court of Appeal, December 10*th*, 1805.

Bholanath Surma *versus* Rajchunder Surma.

CASE IX.

Q. A person who had lived in coparcenary with his two nephews, separated himself from them, and caused a partition to be made of the moveable and immoveable property. From that time he continued to live with his own son, who, having acquired some property, subsequently died, leaving a widow. By the widow's consent, one of the nephews performed the funeral ceremony, &c. of her deceased husband. The father next died, and his obsequies and funeral ceremonies were also performed by one of the nephews, and in the same manner as that of his son. It appears that the property in dispute is the joint acquisition both of the father and son. Both the nephews who are separated, and the widow of the son, are alive. Under these circumstances, which of the surviving individuals is entitled to the succession ?

Brother's sons though separated exclude a son's widow.

R. In default of heirs down to the brother, the nephews succeed, to the entire exclusion of a son's widow; and the son having died before the father, the nephews will be his heirs. Whosoever dies leaving no heir down to the great-grandson, his widow is sole proprietor of his estate, whether it consist of land or personal property. Consequently the acquisitions of the son will devolve on his widow; but not the property left by his father, who survived him.

May 18*th*, 1820.

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CASE X.

Q. A person had three sons, A, B and C, who divided their paternal estate, and took possession of their respective shares. A, the eldest, died, leaving three sons, one of whom died leaving no heir. The second son, B, died, leaving a widow and a daughter; and the younger son, C, died, leaving a daughter and her two sons. B's widow, who succeeded him in possession of his share of the property, left at her death a daughter, who also died subsequently, leaving a daughter. In this case, will the property left by B devolve on his daughter's daughter, or on his brother's sons?

Brother's sons exclude the daughter of a daughter.

R. Under the circumstances above stated, on the death of the second son, B, his property which he inherited from his father should have devolved on his widow, then on his daughter, on whose demise her father's brothers' sons are entitled to the succession. Here the daughter's daughter is excluded from inheritance. This opinion is conformable to the *Dáyabhága* and other works of law.

Zilluh 24-Pergunnahs,
September, 1806.

CASE XI.

Q. Of two Hindu landed proprietors who were uterine brothers, one died childless, leaving a widow. The second brother, his son and son's son, died before the widow; but the second brother's son's widow, his own daughter, and daughter's two sons, are living. In this case, on the death of the first brother's widow, will her property devolve on the second brother's son's widow, or on his daughter's daughter's sons, or on the kinsmen sprung from the same paternal stock in the sixth degree of her husband? What is the law, supposing the first brother's widow to have lived with the second brother's son's widow jointly in respect

food and other matters, and supposing the kinsmen sprung from the same paternal stock to have been beyond the seventh degree in point of relationship?

According to the best authorities of Hindu law, a brother's daughter's son has no right of succession.

R. Of the two uterine brothers, supposing one to have died leaving a widow, his property should have devolved on the widow. When the second brother died without a son or son's son, leaving a son's widow, his own daughter and daughter's two sons him surviving; then, on the death of his first brother's widow, neither the second brother's son's widow, nor his daughter, nor his daughter's sons, can have any title to the property of the first brother's widow: as a son's widow has no right of succession to her own father-in-law's property, *a fortiori* she can have no right of succession to her father-in-law's brother's property. The brother's daughter is not enumerated in the series of heirs of one who leaves no male issue. Although it is maintained in some copies of the *Dáyacramasangraha,* that a brother's daughter's son has a right of succession, yet this doctrine is wholly omitted in many copies of that tract, and there is no rule in the *Dáyabhága,* the commentary by *Sricrishna Turcálancára, Dáyatatwa,* or other authority to the effect that the brother's daughter's son has the right of succession. In this case, the kinsmen in the sixth degree sprung from the paternal stock first succeed, and in default of them, those who are of the seventh or more remote degree succeed, according to their proximity in the order of relationship. The fact of the second brother's son's widow living with her husband's uncle's widow, in respect of joint food and other matters, is not the means of conferring upon her any right of succession, as the *Dáyabhága* and other authorities current in Bengal contain no special rule to that effect, dependant on the division or non-division of the property. This opinion is conformable to the *Dáyabhága, Dáyacramasangraha, Dáyatatwa,* and other authorities current in Bengal.

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Authorities.

"Where there are many relatives *(Gnatyah),* or remote kindred *(Saculyah),* or cognate kindred *(Vandhuva),* he who is nearest of kin shall take the wealth of him who dies without male issue."—*Vrihaspati,* cited in the *Dáyatatwa* and *Dáyacramasangraha.*

Zillah Mymunsing,
March 5th, 1819.

CASE XII.

Q. There were four brothers, namely, Deokeenundana, Dhurneedhur, Ramkant, and Kaleepershad. Deokeenundana died in the month of Bysakh 1222 B. S., leaving two sons. In the year 1197 B. S. Dhurneedhur died childless, and his widow Sooradhunee also died in the month of May 1218 B. S. Ramkant died in the year 1216 B. S. and his widow Joymunee and two sons are still living; and Kaleepershad died childless in the year 1201 B. S. leaving a widow, who is still living. The brothers were possessed of some landed property in equal portions, and according to the award given by arbitrators, the widows of Dhurneedhur and Kaleepershad were in the enjoyment of the produce of their respective husbands' shares of the estate while they were living, and on their death their shares were divided between Deokeenundana, Ramkant, and their heirs. In this case, on the death of Sooradhunee the widow of Dhurneedhur, was the widow of Kaleepershad entitled to any portion of the produce which Sooradhunee received?

A brother's widow does not rank among heirs.

R. Supposing the widows of Dhurneedhur and Kaleepershad to have enjoyed the produce of their respective husbands' shares of the estate during their lifetime, on the death of one of them, being the widow (Sooradhunee) of Dhurneedhur, the widow of Kaleepershad had no right to get any portion of the produce which belonged to Soo-

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radhunee, because the law nowhere recognizes the brother's widow as one of the heirs of a person who dies leaving no male issue.*

Sudder Dewanny Adawlut,
August 11th, 1824.

Musst. Jymunee Dibia *v.* Ramjy Chowdry.

CASE XIII.

Q. Of four brothers who had jointly succeeded to an estate, the eldest died, leaving a widow and daughter's son, whose mother is dead; the second died, leaving a son; and the youngest of all, being the fourth, having been afflicted with leprosy, or a similar disease, died unmarried. Now there are surviving four persons, namely, the widow and grandson in the female line of the eldest brother, the son of the second brother, and the third brother, and they all claim the inheritance. In this case, how will the property be divided among the surviving claimants?

The claimants to a joint estate being a widow, a son, and a brother, they will each take a third, to the exclusion of a daughter's son.

R. Under the circumstances above stated, the widow of the eldest brother, the second brother's son, and the third brother are equally entitled to the succession; that is to say, each of them is entitled to one-third of the property. The daughter's son of the eldest brother has no right of inheritance while his grandmother survives.†

Zillah Jungle Mehals,
May 22nd, 1819.

* The property which was possessed by Sooradhunee, the widow of Dhurneedhur, will devolve on the heirs of Deokeenundana alone, by whom the heirs of Ramkant and Kaleepershad are excluded, because the persons from whom they inherited died prior to the death of Dhurneedhur's widow. This appears to have originated in the same case as No. 7, though the opinions were given in different courts.

† Supposing the fourth brother to have had no bodily defect, such as leprosy, or other disease, (which would prove an impediment to succession,) at the time of his father's death, he ought to have had

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CASE XIV.

Q. A *Brahmin,* having caused partition of the landed estate and effects which he had held jointly with his uterine brother, lived apart, and died leaving a minor son, an unmarried daughter, a widow, and the sons of his brother above mentioned. His son subsequently died; then his widow. There is a possibility that his daughter will have male issue, and she claims her father's estate. Is this daughter, or are his brother's sons entitled to the succession?

A sister is excluded by brother's sons.

R. Under the circumstances above stated, the daughter is excluded; as, on the death of the proprietor, his property devolved on his son, on whom she confers no benefit by presenting funeral oblations to his manes. The brother's sons are entitled to the succession, because they present the funeral oblations to two ancestors, which the original proprietor was bound to offer.

Zillah Burdwan,
December 3rd, 1819.

Unnapoorna Dibia *versus* Gungahuree Shiromunee and others.

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an equal share with his brothers; as his right of inheritance accrued immediately on the death of the father; and if a title is once vested in a male heir, it cannot be lost again by any supervenient disqualification. Consequently, the subsequent disease of the fourth brother would have been no bar to succession; and on his death, his share, that is, one-fourth of the patrimony, would have devolved on his third brother, who survived him. The widow of his eldest brother, and the son of the second, would have had no concern with it, as they are excluded by the brother in this case. In the case here cited, however, it will be perceived that the second brother's son inherits, not as a nephew, but in succession to his father. It was not a question as to the inheritance of an uncle's property.

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CASE XV.

Q. A *Brahmin* was survived by his five sons, two of whom died childless. The fourth brother had a son, who died before his father, leaving a widow and a maiden daughter; the fifth died without issue, and the third brother died leaving four sons, the eldest of whom died childless, and the second and third each left a son. The fourth brother's son's daughter, being married, has male issue. In this case, on the death of the fourth brother, who, among the survivors, are entitled to inherit his property?

A brother's son inherits, to the exclusion of a son's daughter's son.

R. It appears that the son who died before his father left a widow and a maiden daughter, and subsequently the daughter having been married, had a son. But where there is a brother's son, and a son's daughter's son surviving, the brother's son is entitled to the succession: the deceased son's daughter's son has no legal claim to inherit from his maternal great-grandfather. This is the opinion of the authors of the *Dáyabhága* and other works.

March 21*st*, 1821.

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SECTION VI.

Of Sisters' Sons, &c.

CASE I.

Q. A person died, leaving a son and three daughters him surviving. Subsequently to his death, his son departed this life before his three sisters. Of the three sisters one died, leaving a son who is alive; and of the surviving, one is mother of two sons, who are living, and the other is a childless widow. Under these circumstances, how will the property left by the original proprietor be distributed among the survivors? Is any one of the survivors authorized to give or sell a portion of the property, such portion not exceeding his or her share?

Fathers' daughters' sons are the legal heirs, on failure of brother's sons.

R. On the death of the father, his entire estate should have devolved on his son only, by whom his daughters are excluded. If the son died, leaving no heir down to the brother's son's son, his father's daughters' sons are equally entitled to inherit from him. The sisters have no right to succeed their brother. Each of the father's daughters' sons is authorized to make a gift or sale of his own share of the property. The sisters under no circumstances are competent to make any alienation of the property. This opinion is conformable to the *Dáyabhága, Dáyatatwa, Menu,* and other legal authorities.

Authorities.

Goutama:—"Let ownership of wealth be taken by birth, as the venerable teachers direct."

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"The right of a son to the father's property accrues on the extinction of the father's property; and by his own birth; and by such ownership, the son is competent to take his father's estate." This is the doctrine of the *Dáyatatwa*.

The following is the doctrine laid down in the *Dáya-bhága*: "On failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son."

Menu says: "For even the son of a daughter delivers him in the next world, like the son of a son; and his father's or grandfather's daughter's son, like his own daughter's son, transports his manes over the abyss, by offering oblations of which he may partake."

Boudháyana, after premising, "A woman is entitled," proceeds, "not to the heritage; for females, and persons deficient in an organ of sense or member, are deemed incompetent to inherit."

"The construction of this passage is, 'a woman is not entitled to the heritage.' But the succession of the widow and certain others, (viz., the daughter, the mother, and the paternal grandmother,) takes effect under express texts, without any contradiction to this maxim."

Menu: "The first gift, *or troth plighted*, by the husband, is the primary cause *and origin* of marital dominion."*

Zillah Nuddea.

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* It was not distinctly stated in this case whether there was any possibility that the sister, who was the mother of two sons, might bear other sons, or whether she was past child-bearing, or widowed. If the father's daughter's sons make partition of their maternal uncle's estate while one of them is capable of bearing more children, and

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CASE II.

Q. A minor who had succeeded to some ancestral landed property, died leaving a step-mother, an unmarried uterine sister, and three paternal uncles. Subsequently to his death, his sister was disposed of in marriage, and had a son born in lawful wedlock. In this case, according to the law current in this country, on which of the persons above mentioned does the property left by the deceased minor devolve?

A sister's son excludes a step-mother and paternal uncles.

R. Under the circumstances above stated, the sister's son is exclusively entitled to succeed to his uncle's estate, he being the grandson of his (the minor's) father. The step-mother must be provided by him with food and raiment out of the estate. The paternal uncles were not entitled to succeed, because there was a probability of the sister's bearing a son.

Authorities cited in the *Dáyabhága.*—"On failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son, in like manner as it descends to the owner's daughter's son; for even the son of a daughter delivers him in the next world, like the son of a son." "*Yájnyawalcya* likewise uses the term 'gentiles' or kinsmen *(gotraja)*, for the purpose of indicating the right of inheritance of the father's and grandfather's son, as sprung from the same line, in the relative order of the funeral oblation." This is according to *Jimūtavahana.*

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subsequently to the partition a son be born, he should have an equal share of the inheritance, for the succession of a son after partition is in this case provided for. *Yájnyawalcya* declares: "When the sons have been separated, one afterwards born of a woman equal in class shares the distribution. His allotment must positively be made out of the visible estate, corrected for income and expenditure."

The text of *Menu*, laid down in the same authority: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

The text of *Vrihaspati*, cited in the *Vyavahdratatwa* and other authorities: "The property of a house, arable land, a market, or other immoveables, which are possessed by a friend, or a near kinsman in the male or female line, who is not the proprietor, shall not be lost to the rightful owner."*

Dacca Court of Appeal, May 31st.

CASE III.

Q. 1. Of two brothers the eldest had a son (since dead), whose son A is living. The second brother had a son, B, and three daughters, C, D and E. B died unmarried. Of the daughters, C. and D died, the former leaving no male issue, and the latter leaving a son, F. The last named daughter, E, is living, and has a son, G. The above individuals lived separately as a divided family, and B died possessed of his father's property. In this case, which of these three individuals, (that is to say, A, E and F,) is entitled to succeed to the estate left by B ?

Sisters have no right of inheritance, but their sons exclude the paternal uncle's son's son.

R. 1. It appears that B died, leaving no heir down to a daughter's son; consequently his father's two grandsons

* This is a correct opinion according to the law of Bengal, conformably to which the exposition was required to be given; but according to the law of Benares the sister's son is not expressly mentioned as an heir, and at all events can come in only in default of all *Samanodacas*, or lineal male descendants as far as the fourteenth in degree.

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in the female line, that is, F and G, are entitled to share equally the property left by him, because they confer benefits on his father by offering the funeral cake to his manes. Here the father's daughters' sons are living, and succeed in default of his own daughter's son. The nearest kinsman who sprung from the same line, that is, A, the uncle's grandson, has no right of succession. E (the sister of B) has no title to inherit her brother's estate.

Q. 2. Supposing it to have been an invariable rule in the family, that the nearest kinsman of the same stock should inherit, though there be a daughter and daughter's sons living, and a member of such family die, leaving no son; according to law, will his property in such case devolve on the kinsman, or on the daughter and daughter's sons?

Unless the contrary should have been the invariable usage.

R. 2. Should it be proved that the usage stated in the question has been invariable and immemorial in the family of the parties, in this case B's property will devolve on his kinsman (A), to the exclusion of the other heirs.

Zillah Jungle Mehals,
June 16*th*, 1823.

CASE IV.

Q. Two brothers of the whole blood having divided their paternal estate, consisting of lands, houses, and other real and personal property, lived apart, in the enjoyment of their respective shares. The eldest brother was succeeded by his only son, who died without issue, leaving a sister of the half blood, her sons, a son of his uterine sister, and a grandson of his uncle. In this case, which of the survivors is entitled to inherit?

The son of a half sister succeeds to pro-

R. On the death of the eldest brother's son, in default of heirs down to the brother's grandson, all of his father's

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daughter's sons* are equally entitled to the succession, because they severally confer benefits on him by presenting oblations of food to the manes of his three ancestors, including his father, and there is no difference between the sons of sisters of the whole and of the half blood.

perty jointly with the son of a whole sister.

Zillah Jungle Mehals,
August 2nd, 1826.

CASE V.

Q. A person dies, leaving his paternal uncle's son's son, and a son of an uterine sister; in this case, are both the survivors entitled to the succession; if not, which of them has the superior title?

R. Under the circumstances above stated, the sister's son is exclusively entitled to the heritage.

According to the law as current in Bengal, a sister's son excludes a paternal uncle's grandson.

Authorities.

"In default of heirs down to the father's great-grandson, the father's daughter's son succeeds; for he presents the funeral cakes to the manes of the three ancestors of the deceased proprietor, of which his father partakes."†

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* The sons of the proprietor's own sister, and the sons of his half sister, have an equal right of inheritance. See note to the *Dáyabhága*, page 225.

† This question was circulated by the Register of the Shahabad court to certain contiguous jurisdictions for the opinions of their law officers. The Pundit of Zillah Behar, in his *Vyavasthá*, interpreting the text of *Yájnyawalcya*, "A wife, daughters, both parents, brothers, their sons, kinsmen sprung from the same original stock, distant kindred," &c., stated, that in default of heirs down to the brother's son, the *gotraja* (kinsmen sprung from the same original stock) inherit; on failure of such heir, the distant kindred; and that the sister's son is ranked among the latter, who should succeed after the former. This opinion is conformable to the law as current in Mithila, Benares, and other provinces, as the followers of those schools do not rank the sister's son among the series of heirs enu-

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CASE VI.

Q. A man died leaving two sons, a daughter and her son. Subsequently to his death his eldest son died without male issue, leaving the above named individuals him surviving, and then the younger died, leaving a widow and a daughter. Lastly, the widow and the daughter of the younger son died, the latter leaving her husband and an unmarried daughter. In this case, which of the survivors is entitled to the landed estate left by the father?

The sister's son excludes the daughter of a daughter.

R. On the death of the younger son, his widow was entitled to his entire property; and on her demise, her daughter derived from her a title to the inheritance. The daughter's husband and daughter are however excluded, because they confer no benefit on the deceased proprietor. The father's daughter's son is entitled to the inheritance.*

February 28th, 1817.

Jynarain Mookherjya, *v.* Ramruttun Chatoorjya.

CASE VII.

Q. A person possessing some landed property dies, leaving a son and four daughters. Subsequently to his death, the son takes possession of the whole of his paternal estate, and dies without male issue, leaving his sisters above named, two of whom died, leaving neither husband nor children; and of the surviving sisters, one had three sons, and the other a son by adoption. Under these circumstances, to what proportion of the estate will each individual survivor be entitled?

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merated in the text of *Yájnyawalcya;* but it is contrary to the doctrine prevalent in Bengal.

* The right of a father's daughter's son is admitted by the followers of the Bengal school only; the law as current in Benares and Mithila, does not acknowledge him to be an heir of his uncle, and there are not wanting authorities for the right of succession of a daughter's daughter; but this doctrine is nowhere respected. See Chapter on Inheritance, vol. i.

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R. Under the circumstances above stated, according to law, the estate will be made into seven parts, of which the three sons of one sister will take six shares, and the adopted son of the other the remaining one.*

In Bengal, the adopted son of a sister takes a seventh, as co-heir with three sons of another sister.

Zillah Hooghly,
September 28th, 1812.

CASE VIII.

Q. A person dies, leaving a widow as his heir; and the widow dies, leaving her husband's paternal grandfather's brother's grandson and great-grandson in the male line, and also her husband's sister's son. In this case, which of these three surviving individuals is entitled to succeed to her husband's estate?

R. The sister's son is, by law, entitled to the inheritance. The paternal grandfather's brother's grandson and great-grandson have no claim to the succession.

A sister's son excludes paternal grand-uncles' descendants.

Zillah Burdwan,
May 12th, 1823.

CASE IX.

Q. A landed proprietor, having filed a suit in a court of justice to obtain possession of his paternal landed estate, died previously to its decision, leaving an uterine sister, her son, the son of another sister, and a descendant in the fourth degree of the paternal line. Subsequently to his death, the sister's son claimed to be his representative, and died while the claim was pending. There are now surviving his sister, her son's widow, the son of another sister, and the descendant in the fourth degree of the

* The above is an accurate exposition of the law as current in Bengal; but according to the law of Benares, the property would have been made into ten parts, of which the adopted son would take one. There is no express authority for the succession of the adopted son of a sister, but his right is admitted by inference.

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paternal line. Under these circumstances, which of the surviving individuals is entitled to the succession ?

A sister's son excludes a descendant in the male line of the great-grandfather.

R. Under the circumstances above stated, on the death of the original proprietor, his sole heirs were his two sisters' sons, by whom his great-grandfather's descendant, (in other words, the fourth person in descent of the paternal line,) is excluded from the inheritance. It is mentioned in the *Dáyatatwa,* that he is entitled to the succession who confers the most benefit in presenting funeral oblations.

The person in the fourth degree of descent is indeed a giver of funeral oblations to the proprietor's great-grandfather ; but his sisters' sons present oblations to his three ancestors, including his father, (who is principally considered.) Consequently his great-grandfather's descendant cannot inherit, where there are his father's daughters' sons surviving.

The text of *Menu* cited in the *Dáyabhága :* "To three must libations of water be made ; to three must oblations of food be presented; the fourth in descent is the giver of those offerings ; but the fifth has no concern with them."

But on failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son. This is the opinion of *Jimūtavahana.*

Sricrishna says :—"The father's daughter's son inherits though there be the grandfather's uterine brother or the like living."

Consequently, on the death of the proprietor, his father's two daughters' sons should have succeeded to the property which their uncle left; and on the death of one of them

ters' sons, his widow is entitled to her husband's share of the estate.

To this effect is the text of *Vrihat Menu,* cited in the *Dáyabhága:* "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share."*

Zillah Mymunsingh,
May 18*th,* 1823.

CASE X.

Q. A person died, leaving a widow and a sister's son, who died before the widow, leaving a son. Is the sister's son's son entitled, on the death of the widow, to inherit the property left by her ?

R. The sister's son's son, whose father died previously to the widow's decease, has no title to the succession. **A sister's grandson is not an heir.**

Zillah Sylhet,
May 8*th,* 1812.

CASE XI.

Q. A, (a Hindu,) died, leaving a widow and a father. Subsequently the father died, leaving a widow, (B), not the mother of A, a minor son, (C), and a sister's son, (D). Afterwards C died childless. Subsequently to C's death, the widow, (B), took possession of the property left by the father, and executed a Will assigning over the entire property to her husband's sister's son, (D), and died without putting the legatee into possession of the property willed away. In this case, is the Will, according to the law as current in Mithila and Bengal, valid and binding ? On the other

* It will be perceived that this case and the one preceding were answered according to the law of Bengal.

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hand, supposing no Will to have been executed, does the property in question go to the sister's son of A's father, or to his widow, by right of inheritance?

According to the law of inheritance as current in Bengal, the father's sister's son is the eighteenth in the order of succession; but according to the law as current in Mathila and Benares, he is not entitled to the inheritance so long as there is a *gotraja* or gentile, which term includes all those descended from the same primitive stock, as far as the fourteenth generation.

R. Supposing A to have died, leaving a widow and father, and the father to have died subsequently, leaving a widow, (B), being the step-mother of the deceased, A, a minor son, (C), and a sister's son, (D), and the minor C to have died childless, and subsequently to this, the widow of the father to have enjoyed the property in question, to have assigned it to her husband's sister's son, (D), by the execution of a Will in his favour, but to have died without putting D into possession of the property therein specified; in this case, according to the law as current in Mithila and Bengal, the Will cannot be held to be valid and binding. And the heirs who are entitled to succeed to the property may be thus enumerated. The widow of the first deceased, (A,) who died before his father, is, according to the law as current in Mithila and Bengal, competent to inherit her husband's property, supposing it to have been divided and separated from that of his co-heirs. If the property was held in joint tenancy, his widow, according to the law as prevalent in Bengal, is entitled to succeed to that portion which was her husband's share; but, according to the law as current in Mithila, she would not be entitled to succeed even to this, for the law-expounders of that school declare, that the widow's right of succession depends on the partition of the joint stock, partition being, according to them, the sole cause of creating individual proprietary right. Therefore of A's property, so much as was not his *vibhucta* or divided, and *asadharana* or exclusive property, according to the law as current in Mithila, and so much as was not his individual proportion, or his share of the joint-property, according to the law as current in Bengal, will, on the death of the first deceased son, (A,) devolve entirely on his father, even though his widow was living. On the death

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of the father, the whole property to which he (the father) succeeded, should have devolved on his minor son, (C.) At the death of such son, leaving no child, his property should have devolved on his next heir, that is, according to the law as current in Mithila, in default of heirs from the widow down to gentiles, on his father's sister's son, he being ranked among the cognates; and not before: but, according to the law as current in Bengal, in default of heirs from the widow down to the grandfather's grandson, the father's sister's son is entitled to the succession, he being the grandfather's daughter's son.

This opinion is conformable to the *Vivádachintámani* and other authorities, as current in Mithila, as well as to the *Dáyabhága* and other law tracts, as prevalent in Bengal.

Authorities.

1. The passage of the *Mahabhárata* cited in the *Vivádachintámani, Dáyabhága,* and other authorities: "*Simple* enjoyment is declared to be the fruit which women gather from the heritage of their lords: on no account should they waste the estate of their husbands."

2. "The term "waste" means to give, sell, or make other alienation at pleasure."—The *Vivádachintámani.*

3. The text of *Vishnu* cited in the *Vivádachintámani* and other law tracts:—"The wealth of him who leaves no male issue, goes to his wife; on failure of her, to his daughter; failing her, to his mother; in her default, to the father, and so forth."

4. "This rule applies to the husband's divided property."—The *Vivádachintámani.*

5. "Therefore the doctrine of *Jitendriya,* who affirms the right of the wife to inherit the whole property of her

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husband, leaving no male issue, without attention to the circumstance of his being separated from his co-heirs or reunited with them, (for no such distinction is specified,) should be respected."—The *Dáyabhága.*

6. "On failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother; as is declared by the following text (of *Yájnyawalcya*): "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's paternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred." This must be understood to be the order of succession here intended."—The *Vivádachintámani.*

7. The following is a text of the *Dáyabhága*:—"The succession of the grandfather's and great-grandfather's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering."

8. In the case of non-partition, the text of *Sancha* cited in the *Vivádachintámani* applies: "To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food, and old garments which are not tattered."

Sudder Dewanny Adawlut,
December 18*th*, 1826.

Mussummut Hureea Beebee *v.* Bhowanee Lal.

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CASE XII.

Q. A widow of the *C'shatrya* tribe, who was in possession of her husband's estate, died childless, leaving, as the only claimant to the property, her husband's maternal uncle's son. In this case, is the individual above alluded to entitled to inherit the property left by the widow, by reason of there being no other natural heir or adopted son?

The maternal uncle's son is heir after the mother's sister's son, according to the *Mitácshará*, and according to *Sricrishna's* commentary on the *Dáyabhága*; but according to the *Dáyacramasangraha* and other Bengal authorities, he ranks immediately after the maternal uncle.

R. If the widow of the childless man in question died possessed of her husband's estate, leaving her husband's maternal uncle's son, and there be no one of her husband's heirs surviving down to the mother's sister's son, then, according to the series of heirs enumerated in the *Mitácshará* and other authorities current in the western provinces, and if there be none surviving down to the maternal uncle, according to the series of heirs as enumerated in the *Dáyacramasangraha* of *Sricrishna Tarcálancára*, *Vivádárnavasetu*, and *Vivádabhangárnava*, which prevail in Bengal, and if there be none surviving down to the mother's sister's son, according to the series of heirs as enumerated by *Sricrishna Tarcálancára* in his commentary on the *Dáyabhága*, then, agreeably to these three authorities, the entire property left by the deceased widow will devolve on her husband's maternal uncle's son, he being ranked among the *Atmabandhu*, or own cognate kindred, provided at her death she left no adopted son. This opinion is consonant to the *Mitácshará* and other authorities as current in the western provinces, as well as to the *Dáyabhága*, the commentary by *Sricrishna Tarcálancára* on the *Dáyabhága*, the *Dáyacramasangraha*, *Vivádárnavasetu*, *Vivádabhangárnava*, and other law tracts as prevalent in Bengal.

Authorities.

1. The text of *Yájnyawalcya* cited in the above authorities: "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates," &c.

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2. " On failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother; as is declared by the following text: " The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred." Here, by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance: on failure of them, his father's cognate kindred; or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."—The *Mitácshará.*

4. Failing him (the maternal grandfather), the maternal uncle; (in default of him), his son; and (on failure of him), his grandson. In default of the maternal uncle's grandson, the maternal grandfather's daughter's son succeeds.

5. The succession devolves on the maternal uucle and the rest, who present oblations which the deceased was bound to offer. In default of these, the heritage goes to the son of the owner's maternal aunt; or, failing him, it passes successively to the son and grandson of the maternal uncle. The commentary by *Sricrishna Tarcálancára* on the *Dáyabhága.*

3. " On failure of any lineal descendant of the paternal great-grandfather, down to the daughter's son, who might present oblations in which the deceased would participate, to intimate, that, in such case, the maternal uncle [illegible]

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inherit in consequence of the proximity of oblations, as presenting offerings to the maternal grandfather and the rest, which the deceased was bound to offer: *Yájnyawalcya* employs the term "cognates" (*bundhoo.*)*

Sudder Dewanny Adawlut,
May 30*th*, 1826.

Mussummaut Munnoo Beebee *v.* Gokulchund.

CASE XIII.

Q. An unmarried person, possessed of some immoveable property, which had descended to him from his father and grandfather, died leaving an adult sister, whose husband is living; a paternal grandmother, and several paternal uncles him surviving. In this case, which of these claimants is entitled to inherit? Supposing the grandmother to have died before the other individuals specified in this case, which of the survivors is entitled to succeed to the property?

The claimants being a childless sister, a paternal grandmother, and paternal uncles; the grandmother is the heir.

R. If any person, being in possession of certain ancestral immoveable property, die, leaving a sister him surviving, whether she be a minor or an adult, and whether she have a husband living or is a widow, such sister cannot inherit. Her sons may legally inherit; but it appears from the question, in this case, that the sister is destitute of male issue; consequently the grandmother was entitled to the succession, and if she died before the other individuals mentioned in the question, then the succession should

* Two conflicting opinions are ascribed to *Sricrishna Tarcálancára. Sricrishna*, the author of the commentary on the *Dáyabhága*, makes the maternal uncle's son succeed after the mother's sister's son, thus assigning to him the 33rd place in the order of succession; while *Sricrishna*, the author of the *Dáyacramasangraha*, makes him succeed immediately after the maternal uncle, thus assigning to him the 30th place. The latter doctrine appears to be the most approved.

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devolve on the paternal uncles. This opinion is consonant to the *Dáyabhága*, its commentary the *Dáyacramasangraha*, *Vivádabhangárnava*, and other authorities.

Authorities.

The *Dáyabhága* :—"On failure of heirs of the father down to the great-grandson, it must be understood that the succession devolves on the father's daughter's son." The commentary (on the above authority), "She (the sister) is excluded from the succession, because she is no giver of oblations at periodical obsequies, being disqualified by sex. If there be none, the father's own brother is heir."

The *Dáyacramasangraha* :—"On failure of the brother's grandson, the succession goes to the father's daughter's son; in default of him (the paternal grandfather), the paternal grandmother is heir; failing her, the uncle succeeds."

The same opinion is held by the authors of the *Vivádabhangárnava*, and *Vivádárnavasetu*.

Calcutta Court of Appeal, January 6th, 1827.

CASE XIV.

Q. A person died, leaving his paternal grandmother, two paternal uncles, and an uterine sister, about twenty-five years of age, whose husband is aged about thirty-five, by whom she had two daughters, the one five and the other three years old; and there is a probability of her having male issue. In this case, which of the above named individuals is entitled to inherit the estate of the deceased? If the probability of the sister's bearing male issue is a bar to the succession of the other claimants, and the grandmother be dead; in this case, whether should the management of the estate be confided, in the mean time, to the paternal uncles, or to the sister? Supposing the sister to have no

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male issue, and that the possibility of her having any is extinct; in this case, who is entitled to the succession?

R. Supposing the deceased to have been survived by his paternal grandmother, two paternal uncles, and an uterine sister, who is likely to have male issue, then, on the death of the grandmother, the uncles who confer benefit to the deceased by offering the funeral cake to his grandfather and great-grandfather are entitled to the property left by him; and if the sister have no male issue, they (the uncles) are the successors, their right of inheritance being then unqualified. Consequently the management should be confided to them, and not to the sister, for she cannot by law be considered as heir to her brother. But whenever a son may be born to her, he will be entitled to succeed to the property. This opinion is conformable to the *Dáyabhága*, *Dáyacramasangraha*, the commentary on the *Dáyabhága*, and other authorities.

And failing the paternal grandmother, the paternal uncles succeed; but their property is divested, should the sister subsequently have male issue.

Authorities.

The *Dáyabhága*:—" The paternal uncle is indeed a giver of oblations to the grandfather and great-grandfather of the proprietor."

The *Dáyacramasangraha*:—" Failing the paternal grandmother, the uncle succeeds; for he presents two oblations to the paternal grandfather and great-grandfather of the deceased owner."

The commentary on the *Dáyabhága*: " The sister is excluded from the succession, because she is no giver of oblations at periodical obsequies, being disqualified by sex."

" They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

Calcutta Court of Appeal,
February 14*th*, 1827.

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SECTION VII.

Of Fellow Students, &c.

CASE I.

Q. On the death of a childless widow, who left apparently no heir, her property was seized by the ruling power, and a proclamation was issued for the appearance of her heir and representative within a certain period. After the expiration of the period fixed, a *gosain* appeared, and presented a petition for the property, alleging that the widow was his father's disciple; and he also proved, by the testimony of his four pupils, that she was his father's follower: but, according to the established usage of this country, no *gosain* has ever received any property of his disciple, and it does not appear, that in the instance of any disciples of a *gosain* dying without an heir, such *gosain* received his property under the jurisdiction of this court: under these circumstances, is the *gosain*, according to law, entitled to succeed as her heir; and can he, as such, claim her property?

An *acharjya* or spiritual teacher is ranked among the heirs according to the Hindoo law, but not a *gooroo*. In default of heirs, the property of a person deceased escheats to the king, except he be of the *Brahminical* order.

R. In default of heirs down to the *samánodacas*, or kinsmen allied by the common libation of water, the succession devolves on the spiritual teacher *(achárjya.)* The *gosain* is the widow's *gooroopootra*, or the son of her spiritual guide. A *Gooroo* is not termed an *Achárjya*. If the widow was not of the *Brahminical* order, her property should escheat to the king, who alone becomes heir. So *Menu* directs:—"The property of a *Brahmin* shall

never be taken by the king: this is a fixed law. But the wealth of the other classes, on failure of all heirs, the king may take."

Zillah Hoogly,
April 3rd, 1817.

CASE II.

Q. A religious mendicant died, leaving no heir; but there is a person who calls himself the pupil of the same spiritual teacher with the deceased, and alleges that he is therefore entitled to the succession. Is such person recognized as a brother by the fraternity of mendicants?

A fellow disciple is by general usage allowed to be heir, in default of nearer claimants.

R. There is no provision in the *Dáyabhága* and other works of law, that on the death of a religious mendicant his spiritual teacher's pupil has the right of succession to his estate, and there is no relationship between them; but the person who becomes a follower of the spiritual teacher is universally termed a religious brother by the fraternity of devotees. If such person attend the deceased on the point of death, and perform his exequial rites, and if the spiritual teacher himself disclaim all right of succession, such religious brother is entitled to the inheritance. This doctrine is justified by universal usage.

CASE III.

Q. A *Byragee*, or religious mendicant, having consecrated an idol, died, leaving considerable property. Subsequently to his death, his brother claims his estate; and a person who is a stranger to him in blood also claims the estate, and adduces sufficient evidence to prove that the mendicant had left the order of a housekeeper, had become an ascetic, and had made him (the claimant) his pupil and follower, on the strength of which he had performed the exequial rites of the deceased. In this case, which of these persons is entitled to inherit the property of the defunct?

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To the property of an ascetic, his pupil or follower is heir, not his relations by blood.

R. Supposing the mendicant to have actually left the order of an householder, and to have become an ascetic, in this case, his follower and pupil is entitled to the inheritance, to the entire exclusion of his brother, whose fraternal relation can be held to have effect so long only as the proprietor continued in the order of a householder.

Authorities.

Vrihaspati:—"Decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, there might be a failure of justice."*

August 5th, 1817.

CASE IV.

Q. Balram Seta Das, (a devotee,) had appropriated a building for religious worship, and had established in it an image of the deity. On his death, the plaintiff, who is the widow of the son of Pretram, his *Purohit* or spiritual preceptor, preferred a claim to the temple in question; a son's son of the founder being then living. Under these circumstances, according to the Hindu law, is the claim of the plaintiff in virtue of the relinquishment or appropriation valid, or is the heir of the founder to be considered as owner of the temple?

The heirs of the founder have a com-

R. The building, with the deity, was relinquished to the *Purohit,* and not given to him; indeed, the founder having

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* The above opinion is doubtless correct, though the authority cited in support of it appears wholly irrelevant. The following passage of the *Dáyabhága* justifies the exposition of law as given in reply to the question. "The goods of a hermit, of an ascetic, and of a professed student, let the spiritual brother, the virtuous pupil, and the holy preceptor take. On failure of these, the associate in holiness, or person belonging to the same order, shall inherit."—*Dáyabhága*, page 223.

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relinquished a building in which he had established an image of the deity, did in fact give that building to the deity; hence it belonged to the deity solely: for the deity existing therein, it was impossible to give it to another. By mere relinquishment, proprietary right cannot be established; and, consequently, as the *Purohit* himself never possessed any proprietary right, none can possibly appertain to the widow of his son. The appropriation, which was an auspicious act, is common to the heirs of the founder, in whom the right of enjoyment is vested.

mon right to the use of a building relinquished by him for a place of worship: not so the heirs of the *Purohit*, or spiritual preceptor of the founder.

City of Moorshedabad.

Lukhee Thakoorain *v.* Kewul Punthee and others.

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SECTION VIII.

Of Sons' Widows, &c.

CASE I.

Q. A person had five sons, the eldest of whom died without male issue, leaving a widow. Subsequently to his death the father died, leaving four sons him surviving. In this case, is the widow of his son entitled to share his immoveable property, to the extent of her husband's share, with her late husband's brothers?

A woman cannot inherit immediately from her father-in-law.

R. Under the circumstances above stated, the widow has no title to any portion of the estate left by her father-in-law; but had her husband survived him, she would take the share, on her husband's death, to which he had succeeded. This is the law as contained in the *Dáyabhága* and other legal authorities.

City of Dacca,
July 15*th*, 1817.

CASE II.

The widow of a son is excluded by a brother's sons, but she must be maintained by them.

Q. There were two brothers, the elder of whom had a son, who died during his father's lifetime, leaving a widow and two daughters. In this case, on the death of the elder brother, is his son's widow, or his brother's sons, his brother being dead, entitled to inherit from him. If the former, as on her demise there were two sons and two daughters of a daughter, and a son of another daughter living, which of these survivors are entitled to the property which devolved on the widow by right of inheritance?

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R. The elder brother having died leaving no heir down to the brother, his brother's sons are equally entitled to the succession, but not his son's widow, as the son died before him.

Authorities.

Vishnu :—"The wealth of him who leaves no male issue, goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother; on failure of her, it goes to the brothers; after them, it descends to the brothers' sons."

The brothers' sons having succeeded to their uncle, will provide his son's widow with the proper maintenance.

Zillah Hooghly,
May 22nd, 1821.

CASE III.

Q. 1. A widow, having a daughter and son-in-law, adopted a son, with the sanction of her late husband, and disposed of him in marriage. The adopted son died, leaving a widow, a sister, a sister's son, and his adopting mother, who is since dead. In this case, will the property left by the original proprietor devolve on the adopted son's widow, or on the daughter's son?

An adopted son's widow takes the property of his adopting mother, to the exclusion of such adopting mother's daughter and her sons.

R. 1. Supposing the widow to have adopted the son with her late husband's permission while there were her daughter and other relations living, the son adopted was alone entitled to the property of his adopting mother, which had devolved on her at the death of her husband. On the death of the adopted son, in default of heirs down to the great-grandson, his widow is competent to take the property, even though his adopting father's daughter's son exists. This is the law on the point stated.

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Q. 2. If the widow, by direction of her deceased husband, adopted a boy, having paid a certain sum of money as the consideration to his parents, and such adopted son died without having taken possession of his adopting father's property; in this case, is his widow entitled to the original proprietor's estate or otherwise?

Even though the adopted son should not have taken possession before his death.

R. 2. If the original proprietor left directions with his widow to adopt a boy, and the widow, paying a consideration, adopted one according to the forms prescribed by law, whether the adopted son died with or without taking possession of his adopting father's property, in this case, his (the adopted son's) widow is alone entitled to the succession, and the others have no concern with it.*

City Chinsurah,
August 20th, 1820.

CASE IV.

Q. B, son of A, having died during the lifetime of his father, will his widow take any share in his property, or in that of C and D, his full brothers, who died after their father; and if so, what proportion thereof?

A son's widow has no legal claim of inheritance.

R. If A had three sons, B, C and D, of whom B died without issue, leaving a widow, and if after this A died, leaving heirs, his two remaining sons him surviving, the right of B to the property left by A, is barred by reason of his having died during his father's lifetime. His widow therefore is not entitled to any share in the property of her deceased husband's father. She is entitled to receive maintenance, therefore, and to take by inheritance, during her life, any property of which her husband had possession during his life.

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* In this case, the son adopted became on his adoption *ipso facto* heir to the property of his adopting father, and his widow therefore became entitled to the property as his heir, not as heir to his adopting mother.

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If either C or D died, during the life of their mother, she would take the share of the deceased ; if they both died before, she would take the property of both. If the mother died first, and then the two brothers, the sons of their sister would have taken the property of the two brothers, and after their death, their mother (the sister of C and D) would have succeeded thereto, as their heirs. If the mother of C and D, and the sons of their sisters, died during their lifetime, their sister cannot inherit; and in that case, on the death of C and D, the lineal descendant in the male line of A who is alive and next of kin to those persons, will be entitled to take the said property. This *Vyavasthá* is according to the *Dáyabhága*, *Dáyatatwa*, and other authorities current in Bengal. *Menu*, cited in the *Dáyabhága* and elsewhere: "Brothers, on the death of their father and mother, having divided the ancestral property, will take equal shares: during the lifetime of their father and mother, they have no power over that property." *Devala*, in the *Dáyabhága* and elsewhere: "Sons, after their father's death, will divide the paternal property: if a faultless father be alive, the sons have no power over his property."

And is excluded by her husband's sisters' sons.

But his sister cannot inherit, except through her sons, as mother.

Yájnyawalcya, in the *Dáyabhága* and elsewhere: "On the failure of son or son's son, the wife and the daughter, also both parents, brothers likewise and their sons, gentiles *(gotraja)*, cognates *(bundhoo)*, take the estate in succession." *Dáyabhága*: "On failure of sons and their male issue, the sons of daughters of the father shall obtain the property."*

* The same doctrine, that the widow of a son who died before his father is not entitled to inherit the father's estate, was laid down in the case of Mussummaut Ayabutee *v.* Rajkishen Sahōo, Sudder Dewanny Adawlut Reports, vol. iii, p. 28. See also Elem. Hin. Law, Appendix, p. 240, et seq. I observe among the Bombay Reports (vol. viii, p. 510) a case in which, in answer to the question as to whether the grandsons (sons of the daughter) or daughter-in-law (widow of the

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son) of a person deceased who died without other heirs, would succeed to his estate, the Hindu law officers are reported to have replied, that according to the *shaster*, the widow of the son of the deceased was his heir, but no authority is given for this doctrine. It is true that the author of the *Vijyanti*, a commentary on *Vishnu*, supports the claim of the deceased son's widows; but we have the authority of Mr. Colebrooke, that the doctrine is not generally received. See Elem. Hin. Law, Appendix, pp. 11 and 243.

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CHAPTER II.

Of Maintenance.

CASE I.

Q. A person turned his wife out of his house, whereupon she went and lived in the family of her own brother, and now claims her maintenance from her husband. In this case, can she, according to law, sue for the means of support?

A husband expelling his wife without sufficient cause is bound to maintain her.

R. The wife having been expelled by her husband from his house, and living with her brother's family, is entitled to obtain maintenance from her husband, provided the husband was not justified in expelling her by the circumstances of the case. This is the received opinion.*

Dacca Court of Appeal,
September 9th, 1815.

Rampriya *versus* Bhriguram.

CASE II.

Q. If a man expel his wife from his house, or if she wilfully elope from her husband, and live in the family of her mother; in either case, is she competent to sue for her maintenance?

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* If the wife was turned away on account of unchastity, or similar offence, she has no right to be maintained.

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By voluntary desertion of her husband the wife loses her right to maintenance.

R. If the husband turned the wife out of his house, and she live with her mother; in such case, she is entitled to maintenance. But if she, without her husband's sanction, leave him, and live with her mother, she has no right to maintenance.

Zillah Chittagong,
January 14th, 1820.

CASE III.

Q. A person had two wives, who quarrelled with each other, and the husband turned away his senior wife from his family house. In this case, is the first wife, during the husband's life, entitled to a share of his property? If so, to what proportion?

But an expelled wife is not entitled to demand a share of her husband's property.

R. Under the circumstances stated, the wife is not entitled to demand a share of her husband's property, because she cannot exercise any independent right, as *Yájnyawalcya* says: "All wives, sons, slaves, and unmarried girls, are dependant."

"A woman must be carefully restrained from the smallest illicit gratification; night and day she should be guarded by her mother-in-law and by other venerable matrons."*

"*Menu* has declared that a mother and a father, in their old age, a virtuous wife, and an infant son, must be maintained, even though doing a hundred times that which ought not to be done."

According to the preceding authorities, the eldest wife is entitled only to a sum sufficient for the necessary expenses attendant on her food and raiment, even though expelled

* *Vrihaspati.*

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from her husband's house. It is the general rule, that a wife must be maintained by her husband.

Zillah Sarun,
July 10*th*, 1812.

CASE IV.

Q. A widow was in possession of some property, which had devolved on her at the death of her husband. The widow of her son (who died before his father) sues her for alimony to a specific amount; and on referring the case to a *pundit*, the following *vyavasthá* was given: that "if a widow live in the house of her mother-in-law, the latter should afford her food and raiment; but that no rules as to a specific portion on account of alimony had been laid down in the law, and that this should be determined by extent of means." Is it then necessary, supposing that a disagreement should subsist between the mother and daughter-in-law, that the latter should live with the former? If there should be any established rule making it incumbent to give alimony to the family of the person in possession of the estate, and the person in possession should not give alimony in proportion to the extent of the means, in such case, is it competent to any authority to fix the amount to be given?

R. While the father and other relations of her husband exist, the residence of a widow in their house is declared to be obligatory on her; and the law does not contemplate any case of opposition to this rule, as in the following text.

There is no provision for alimony in the Hindu law, but only for maintenance.

The father-in-law and the rest are bound to maintain a virtuous and childless widow; but there is no provision for a case in which alimony* may be sued for, not having been

* This word, according to its rendering in English law, is not exactly applicable; but there does not appear to be any other better suited to express the sense of the original. Though the Hindu law does

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given in proportion to the means: "Let them (the brothers) allow a maintenance to his (brother's) women for life."

The text says: "A decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of law, or according to immemorial usage, (for the word *yucti* admits both senses,) there might be a failure of justice."

Patna Court of Appeal,
February 25*th*, 1807.

CASE V.

An unchaste widow is not entitled to maintenance from her husband's brothers, even though she may have resigned her right to his property in their favour, in consideration of such maintenance.

Q. There were four brothers, one of whom died leaving a widow, who, having assigned over to them her husband's property, moveable and immoveable, by gift, obtained an agreement from the donees that they would provide her with food and raiment. Subsequently she became pregnant, the fruit of an adulterous intercourse; on which she was expelled from the family house, and the donees now refuse to support her. In this case, has the widow a legal claim to her maintenance from the donees?

R. A virtuous widow of a person who leaves no male heir down to the great-grandson, succeeds her husband; and if she violate his bed, she becomes degraded. Consequently the widow described has no right to her husband's

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not recognize alimony, yet the amount of maintenance is specified with sufficient precision. *Balambhatta* prescribes, that each evening one *prastha* of rice be meted out to the widow, and at the end of every three months a new cloth be given to her. The same provision is made by the author of the *Smritichandricá*. In the case of Musst. Bheloo *versus* Phool Chand, (Sudder Dewanny Adawlut Reports, vol. iii, page 223,) it was laid down by the *pundits*, that if the heirs of a person deceased neglect to assign to his widow a reasonable maintenance, the Judge is at liberty to award a sum sufficient for that purpose; and in the case in question, the court awarded to the widow the sum of 20 rupees *per mensem*.

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heritage, and cannot claim her maintenance, even though she obtained an agreement for her subsistence previously to her offence.

Authorities.

Vyasa:—"After the death of her husband, let a virtuous woman observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods, and especially the adoration of *Vishnu*, practising constant abstemiousness."

Cátyáyana:—"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

Náreda:—"Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord. But, if they behave otherwise, the brethren may resume that allowance."

City Dacca,
January 21st, 1823.

CASE VI.

Q. An individual, by trade a blacksmith, had three sons, whom he brought up and supported until they attained the age of majority, when they separated themselves from each other, and took possession of their father's estate. The father is now old and decrepit, and the sons do not provide him with food and raiment. In this case, is the father entitled to maintenance from his sons, or otherwise?

Sons are bound to maintain their parents.

R. The sons are bound to support their aged parents. This is consonant to the doctrines laid down in the *Vivádabhangárnava* and other works.

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The following passage is cited in the *Vivádabhangárnava:* "*Menu* declared, that a mother and father in their old age, a virtuous wife, and an infant son, must be maintained, even though doing, a hundred times, that which ought not to be done."*

Zillah Nuddea.

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* It is not distinctly stated in this case, whether the property which the sons took possession of, was their father's self-acquisition, or descended to him from his ancestor, and whether the father relinquished his right in favour of his sons, or the sons took possession without his consent. But whether the property be ancestral or self-acquired, if the father have not relinquished his title by gift or other alienation, and have merely permitted his sons to enjoy it, in this case he is competent to disturb their possession. Supposing the property to have devolved on the father by right of inheritance, and the father to have reserved his proper share, (that is, a double share of a son,) and to have divided the remainder among his sons, the father is not entitled to claim the property so divided; and if the father, without reserving his share, or reserving a small portion, have divided his patrimony among his sons, he is competent to have his share from his sons, even though the division was made by him voluntarily. If the property was self-acquired, and he distributed it among his sons, with or without reserving a portion, and subsequently the share reserved be expended or lost, in this case, the father is competent to take back the property from the sons, conformably to a text of *Harita* cited in the *Dáyabhága:* "A father during his life, distributing his property, may retire to the forest, or enter into the order suitable to an aged man; or he may remain at home, having distributed small allotments, and keeping a greater portion. Should he become indigent, he may take back from them." The author of the *Vivádabhangárnava* gives the following explanation of the text cited.

"But when a father, wearied by the mutual contests of his sons, in regard to the fruition of the estate, divides the estate among them, and resides at home, determining, 'I will live apart, reserving a sufficient portion for myself;' then the legislator says, 'He may divide a small part among his sons; and they may gain other property and support themselves; but the father being old, and of course unable to labour, may reserve a considerable sum, sufficient for his own support and for religious purposes, and may *thus* reside at home. However, he must practise no frauds.' But if, in consequence of any accident, his wants cannot be supplied out of the property reserved, however considerable it might have been, then the lawgiver declares, 'Should he lose what he reserved, he may take back from them,

CASE VII.

Q. A merchant died, leaving three sons, who succeeded jointly to the property of their father, and continued to carry on his mercantile concerns. The eldest of these brothers also died, and was succeeded by a son, who remained as a partner in the business with his uncles, and he died childless, leaving a widow. Under these circumstances, is the widow entitled to a share of the property held in coparcenary by her husband and his uncles, or merely to subsistence; and if the former, is she entitled to her husband's share, or less than that?

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namely from his sons, what he gave.' The reason is, that no duty is more strictly incumbent on sons and the rest, than veneration of parents: and, if the purpose cannot be fulfilled even with the whole of the wealth acquired *and distributed* by the father, they must even give wealth acquired by themselves."

Moreover, the sons have no property, and cannot seek independency while their father exists, as *Menu* says: "Three persons, a wife, a son, and a slave, are declared by law to have *in general* no wealth exclusively their own: the wealth which they may earn is *regularly* acquired for the man to whom they belong."

Under these circumstances, the father is not only entitled to obtain maintenance from his sons, although the property be acquired by the sons, but he may take a share of it, whether the acquisition was made with or without the personal labour or pecuniary aid of the father, as will appear from the following texts of the *Dáyabhága.*

"Thus the father has a double share, even of wealth acquired by his own son. For the expression is general: 'Let him reserve two shares;' or 'he may take two shares.' *Cátyáyana* declares it very explicitly: 'A father takes either a double share, or a moiety, of his son's acquisition of wealth; and a mother also, if the father be deceased, is entitled to an equal portion with the son.' The meaning of this passage is, that the father has a right to take either a double share or a moiety of his son's acquired wealth."

The general rule is, that "the father has a moiety of the goods acquired by his son, at the charge of his estate; the son who made the acquisition has two shares, and the rest take one a piece. But if the father's estate have not been used, he has two shares; the acquirer, as many; and the rest are excluded from participation."

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According to the law as current in Benares, the widow of a nephew is entitled to maintenance only from his uncles with whom he was in partnership.

R. Supposing the merchant to have died leaving three sons, and they to have carried on in coparcenary his commercial concerns, and the elder of them to have died leaving a son, who also died leaving a widow, while the property was undivided; in this case, the widow has no title to her husband's share, but she is entitled to her maintenance, as declared by a text: "To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food and old garments which are not tattered."*

Boudhdyana, after premising, "A woman is entitled," proceeds, "not to the heritage; for females, and persons deficient in an organ of sense or member, are deemed incompetent to inherit."

Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except his wife's separate property."—*Nádreda.*

Patna Court of Appeal,
May 8th, 1811.

Mussummaut Chourasee, pauper *v.* Kurmoo Bhukut and another.

CASE VIII.

A widow whose husband died before his father has a legal claim to maintenance only.

Q. There were six brothers, four of whom were by the same mother. They lived together with their father as a joint-family, and one of the four uterine brothers (the second) died before his father, leaving a widow nine years old. Of the three surviving brothers of the whole blood, the eldest acquired some property moveable and immoveable, with his separate funds and exclusive labour. The widow of the second brother now claims one-fourth of her late husband's eldest brother's acquisitions, and the share

* *Sancha.*

of his ancestral property. In this case, is such widow entitled to a share in the property claimed?

R. Under the circumstances stated, the widow has no right to claim any share of her husband's ancestral property, or of his brother's acquisitions, but she must be maintained by the heirs and representatives of her father-in-law. This opinion is conformable to the *Dáyabhága.*

Calcutta Court of Appeal,
December 4th, 1821.

CASE IX.

A woman cannot inherit immediately from her step-son, but she is entitled to maintenance from his heir.

Q. A man dies, leaving some landed property, and two sons him surviving. Previously to the partition of the estate, one of the sons dies, leaving a widow and two sons by different mothers. Subsequently to the death of the second deceased, his two sons died, leaving the property in a joint and undivided state. In this case, is the widow entitled to the whole of the estate of which her deceased husband died seized?

R. The widow, on the death of her son, becomes entitled to her son's share. He and the son by a contemporary wife were sole proprietors of her husband's estate; but she has no title to succeed to her step-son, whose portion devolves on his heirs, unless the step-son died before her own son. In this case, she succeeds to the whole of the property; otherwise, she is entitled only to her maintenance, from the person who inherits the share left by the son of the contemporary wife.

Zillah 24-Pergunnahs.

CASE X.

Q. A person died, leaving two sons by one wife (who died before him), and a widow and her two daughters, and

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A son, on succeeding to his father's estate, must maintain his step-mother and her daughters.

subsequently to his death one of the sons died. There are now surviving a son of his first wife, and a widow and her two daughters; and supposing the widow to have received no portion of the property from her step-son, in this case, is she entitled to any share of the estate; and if so, what is the extent of her right?

R. The widow is only entitled to a proper maintenance from her step-son; and if her two daughters have not been disposed of in marriage, they will also have some share of their father's wealth to defray their nuptial expenses. Should they, after marriage, be in want of maintenance, in consequence of their husbands' inability to support them, they must be provided with food and raiment by their half-brother. This is conformable to the *Dáyabhága* and other authorities.

Zillah 24-Pergunnahs,
January 24th, 1818.

CASE XI.

Q. A widow instituted a suit against her father-in-law and her husband's younger brother, setting forth, that her said father-in-law had some acquired ancestral landed property, and that he had two sons, the elder being her deceased husband, and the younger her deceased husband's full brother; that her husband died before his father and brother, leaving her and her two daughters, one of whom is since dead, but is survived by three minors' sons, and that she claims only sixty rupees *per annum* due on account of her proper maintenance, at the rate of five rupees *per mensem.* In this case, is the widow, whose husband died before his father and brother, competent to bring an action against her father-in-law and brother-in-law for her maintenance? Supposing the plaintiff's husband to have been separated from his father and brother during his lifetime, in this case

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is the widow competent to claim her maintenance from the individuals abovementioned?

R. A son dying before his father, his widow living virtuously and obediently to her husband's family, is entitled to obtain maintenance from her father-in-law or other successor to his property; but if her husband have received his share from his father, and been separated from him, she cannot in that case claim maintenance as against him or his heir. This opinion is consonant to the *Vivádárnavasetu* and other authorities.

The widow of a separated brother is not entitled to maintenance from her late husband's family.

Zillah Beerbhoom,
August 14*th*, 1823.

Kumulmuni Dasee *v.* Bodhnarain Mujmooadar and another.

CASE XII.

Q. A *Rajpoot* died, leaving a widow and a concubine of the *Aheer* tribe, by whom he had four sons; and on his death, his widow performed all the exequial ceremonies necessary on the occasion. In this case, are the sons and their mother entitled to any portion of the property left by the deceased owner; and if so, to what proportion is each of the survivors entitled?

The illegitimate son of a person belonging to one of the regenerate tribes is entitled to maintenance only.

R. Under the circumstances stated, the entire property left by the deceased, excepting such ornaments and clothes as were worn by the concubine and her sons, will devolve on the widow. The concubine and her sons have no right to share such property, but they are entitled to maintenance. This opinion is conformable to *Menu*, the *Mitácshará*, *Vivádaratnácara*, *Vivádachintámani*, and other authorities.

Authorities.

The text of *Vrihaspati*, cited in the *Vivádaratnácara* and other authorities: "The virtuous and obedient son

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born of a *Sudra* woman unto a man who leaves no *legitimate* offspring, shall take a *provision for his* maintenance, and the kinsmen shall inherit the remainder of the estate."

"This relates to the son of a woman not lawfully married."—The *Vivádaratnácara* and *Vivádachintámani.*

"Even a son begotten by a *Sudra* on a female slave, may take a share by the father's choice." "From the mention of a *Sudra* in this place, it follows that the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance."—*Mitácshará. Gotama:* "A son by a *Sudra* woman, born unto a man who leaves no *legitimate* offspring, shall, if he be strictly obedient like a pupil, receive a provision for his maintenance."

"The son begotten on a *Sudra* woman not lawfully married, by a man belonging to one of the three first classes, who leaves no son by a woman of a twice-born class, shall receive a provision for his maintenance, that is, some trifle, as a stock whereon he may earn a livelihood by agriculture or the like.—The *Vivádaratnácara.*

Zillah Bhaugulpore,
July 17*th*, 1824.

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CHAPTER III.

Of Woman's Property.

CASE I.

Q. A woman having purchased some landed property with her own funds, died leaving sons and a grandson, whose father died before her. In this case, will the whole property left by her devolve on her sons, or has the grandson any right to share it with his uncles ?

R. Under the circumstances above stated, the sons of the deceased woman are entitled to her entire estate which had been acquired by herself. The grandson whose father previously died has no right of inheritance. Should there be any maiden daughter, a small portion must be given to defray her nuptial expenses.*

A woman's property goes to her sons, to the exclusion of her grandson, whose father died before her.

Authorities.

Menu:—"When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate."

Dacca Court of Appeal,
May 21*st*, 1811.

Raghunundana Surma *v.* Gopeenauth Bhuttacharjya and others.

CASE II.

Q. Should a woman of any of the four classes receive jewels as a nuptial donation (technically termed *yautaca)*

* It appears that the property in this case, though acquired by the woman, was not of the nature termed her *stridhun* or *peculium*, and the descent of it was consequently not governed by the rules applicable to that species of property. Had this been the case, the daughter would have been a coheir with the sons.

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at the time of her marriage, do all such ornaments so received, belong exclusively to her, or have her husband's mother and younger brother any legal right to share them with her?

Personal property given to a woman at the time of her marriage becomes hers exclusively.

R. A gift of ornaments or other effects to a woman of any one of the four classes at the time of her marriage, by a member of the family, either of her husband or her parents, or by a stranger, is by law termed *Adhya agnee Stridhun*, or in other words, the woman's peculiar property bestowed before the nuptial fire. It becomes her exclusive property, and the husband's mother or other persons have no right to share it with her. The authorities for this doctrine will be found in the *Dáyabhága, Dáyatatwa, Vivádachintámani, Mitácshará,* and other works of law.

Cátyáyana:—"What is given to women at the time of their marriage, near the nuptial fire, is celebrated by the wise as the women's peculiar property bestowed before the nuptial fire."

Náreda:—"What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property."

Menu and *Vishnu*:—"Such ornamental apparel as women wear during the lives of their husbands, the heirs of those husbands shall not divide among themselves; they who divide it among themselves, fall deep *into sin.*"

Cátyáyana again:—"Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it, or bestow it."

City of Dacca,
April 21*st*, 1817.

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CASE III.

A widow cannot dispose of the whole estate which had devolved on her at her husband's death; and on the death of her daughter who succeeded her, it will go to her paternal grandfather's daughter's son, to the exclusion of her husband.

Q. A person had five sons, two of whom died before him. Subsequently to his death, his surviving three sons equally shared the property left by him. One of the sons died, leaving a widow and a maiden daughter: the widow having succeeded him, disposed of the daughter in marriage, and bestowed a part of her husband's landed estate on the daughter and son-in-law, and some time after she gave the remaining property to them. Under these circumstances, are the gifts legal? If the gifts in favour of the daughter only are good and valid, and on the death of the daughter, her husband and her paternal grandfather's daughter's son be living, which of these survivors will succeed her? Should the daughter have disposed of a portion of the property by gift, though her husband was living, in this case, is the gift complete and binding, or otherwise?

R. It is recorded in various legal authorities, that a widow is incompetent to make a gift of her husband's whole immoveable estate which devolved on her by inheritance, although she may, under certain circumstances, give a small portion of it. In this case, the widow disposed of her husband's entire landed estate by two gifts, consequently the donation is null and void. On the death of the widow, the succession should have devolved on her daughter, on whose death the property which she inherited from her mother should go to her paternal grandfather's daughter's son, her husband having no right to inherit it. If the daughter have disposed of a small portion only of the estate by gift, it may be considered legal. This is conformable to the *Dáyabhága*.

Zillah Rajeshahye,
May 21*st*, 1813.

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CASE IV.

Of property assigned to their sister as maintenance by three brothers, one-third will on her death go to her brother's widow.

Q. Three brothers, at the time of the partition of their patrimony, assigned a certain portion of land for the maintenance of their sister. The youngest brother died, leaving a widow; then the second, without male issue; and lastly the eldest, leaving a son. On the sister's death, what portion of the property assigned to her, will the widow of the youngest brother, whose grandson in the female line is living, be entitled to?

R. If the brothers assigned the property, on condition that the sister should only enjoy the rents and profits thereof during her life, and that after her death it should devolve on them, in such case one-third of the property will be inherited by the widow of the youngest brother, in virtue of her husband's legal share.*

Zillah 24-Pergunnahs.

CASE V.

Property inherited by a grandmother goes on her death to her husband's daughter's son, to the exclusion of his brother's son.

Q. A person died, leaving his mother, a son, and a widow him surviving; and on the death of his son and widow, his mother took possession of, and enjoyed the property left by them; subsequently the mother died. The original proprietor's father had another wife, by whom he had a daughter, who died leaving a son. On the death of his mother, the daughter's son of her rival wife and her husband's brother's son claim the property. In this case, which of the two is entitled to the succession?

R. The son of the original proprietor having succeeded his father, and having died leaving no heir down

* Although a brother's widow (the brother being dead at the time the property devolved) is not by law an heir, yet this opinion proceeds upon the principle, that the property never had been actually transferred from the brothers, but merely lent, as it were, to the sister.

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to the paternal grandfather, the widow of that ancestor should have inherited from her grandson; and on her death, her husband's daughter's son is alone entitled to the heritage, to the entire exclusion of his brother's son.*

CASE VI.

Property devolved on a woman from her sons goes at her death to the son of her husband by another wife, and not to her daughter's sons.

Q. A woman having lawfully obtained a title to, and possessed herself of the estate of her sons, who died without issue, dies, leaving a daughter, who is mother of male issue, (two grandsons in the female line,) and a son's son of a rival wife. In this case, on whom does the right of succession to the estate devolve; and among these individuals, with whom does it rest to offer the oblations to the deceased woman? Is that person, whosoever it may be, who according to law becomes the giver of the funeral cake, entitled, in virtue thereof, to any portion of the estate she left?

R. Under the circumstances above stated, the entire estate, which the deceased woman enjoyed in succession to her sons, will devolve on the son's son of a rival wife. Her daughter and daughter's sons have no title to it, the law only admitting her (the mother's) life-interest. The daughter is considered a giver of a funeral oblation, but she thereby becomes heir to her mother's separate property only.

Zillah 24-*Pergunnahs*, *January* 17*th*, 1817.

* This case merely tends to show that the right of the sis is superior (even though she be only a half sister) to that paternal uncle's son, according to the law of Bengal, as applic which province this opinion was of course given. But the inserted under this head, to show that property devolving grandmother by right of inheritance is not her *peculium* or *stri* any more than that which devolves on a mother or widow, and as in those cases, it goes, on her death, to the heirs of the party whom she derived it, and not to her own heirs.

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Divorce on account of adultery does not subject the woman to the loss of her peculiar property.

CASE VII.

Q. On the death of an individual, his widow contracts a second marriage. The widow formerly had received some jewels from her parents, and her second husband chastised her for adultery, and divorced her. In this case, is the husband legally competent to punish his wife, and to divorce her? If so, does the woman become sole proprietor of the property given to her by her parents and former husband?

R. The husband is at liberty to divorce his wife who violates his bed; but the adulteress is entitled to her parents' and former husband's gift of jewels.*

Zillah Midnapore, }
May 15*th*, 1807. }

CASE VIII.

Q. A Hindu, on the marriage of his daughter, gave her one *beegah* of land as *(yautaca)* peculiar property, which she enjoyed during her lifetime. She was survived by a daughter and son, the latter of whom took and retained possession of the property. Before his death, he gave the land in question to a stranger, his sister's son being then living: after his death, it did not clearly appear who had performed his funeral obsequies. Under these circumstances, was the alienation by the son valid?

The daughter or her heir inherits the mother's peculiar property, in preference to the son.

R. The property in question belonged of right to the daughter of the original donee; and her son having no proprietary right in the same, any alienation of the property by him was invalid.

Moorshedabad, }
Court of Appeal. }

Gourenauth *v.* Koonj Madhub.

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* In the *Cali*, or present age, according to the Hindu law, the marriage of a widow is forbidden; but this practice is prevalent among the inferior classes.

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CASE IX.

Q. A *Sudra* woman succeeded by the law of inheritance to two houses acquired by her father. After her marriage, her husband was in possession of the houses, inasmuch as they were their place of residence. The husband executed a deed of sale for the houses in question to a third person. The wife, however, remained in possession of them. Under these circumstances, was the husband competent to make the alienation in question?

The estate of a woman does not, by her marriage, vest in her husband.

R. The husband was not competent to aliene the houses inherited by his wife, and the sale by him was consequently wholly invalid, as marriage does not confer on the husband any right to dispose of a paternal estate to which his wife had succeeded before marriage.

City of Moorshedabad.

Manickchand *versus* Chotee Lal.

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CHAPTER IV.

Of Exclusion from Inheritance.

CASE I.

Q. A leper had two sons, one of whom is also afflicted with leprosy, but he has a son who is free from disease. In this case, has the son who is afflicted with leprosy any right to share his father's self-acquired property with his brother?

R. According to law, the son who is afflicted with leprosy has no title to inherit his father's property. A leper is incompetent to inherit.

Yájnyawalcya says: "An impotent person, an out-caste, and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified), must be maintained; excluding them, however, from participation. But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects."

Náreda declares: "One afflicted with an obstinate or an agonizing disease, and one insane, blind, or lame, from his birth, must be maintained by the family; but their sons may take the shares *of their parents*.

Zillah Sarun,
December 12th, 1809.

CASE II.

Q. Does the right of succession which an insane person would have had to his father, provided he had been of sound mind, devolve on his mother or on his wife? And supposing such insane person to have had a son, born subsequently to the death of his (the insane's) father, which son is since dead; in this case, was the grandson entitled to inherit immediately from his grandfather by reason of his father's insanity; and if so, on his death, has his mother any title to succeed him?

An insane person is excluded from inheritance; and on the death of his son, his wife will take the property, maintaining her husband and his mother.

R. The insane person's wife has no title to inherit from her father-in-law. The widow of the original proprietor excludes her daughter-in-law; but the insane person and his wife must be provided by her with the necessaries of life out of the estate. If, however, after the death of the grandfather, a son of the insane person have been born, and subsequently die, the original proprietor's daughter-in-law will, as mother of the child, take the heritage in succession to her child, and supply food and raiment to her mother-in-law and husband. This doctrine is contained in the *Dáyabhága* and other authorities.

Zillah 24-Pergunnahs, July 12th, 1812.

Ooma Dibya *v.* Rammuni Dibya.

CASE III.

Q. A person dies, leaving a widow, and two sons of his brother; the widow is living, but has quitted the order of a housekeeper, and retired from the world. She had not executed any deed either of gift or sale in favour of her husband's nephews. In this case, are they entitled to the property, by reason of the extinction of her temporal affections?

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R. If the widow have really relinquished her right to her husband's property, and quitted the order of a householder, her husband's brother's sons become entitled to the property left by her, notwithstanding the fact of her not having made any provision in their favour.*

Retirement from the world operates as natural death.

City of Dacca,
June 16th, 1823.

CASE IV.

Q. 1. A person of the Hindu persuasion having become a convert to the Moohummudan faith, on whom will the property which descended to him from his forefathers, and that which he himself acquired, devolve ?

R. 1. Whatever property he, previously to his conversion, was possessed and seized of, will devolve on his nearest of kin who professed the Hindu religion; and whatever he acquired subsequently to his conversion, will go to the person who, according to the Moohummudan law, becomes his legal heir.

In the case of apostacy from the Hindu faith, property acquired before the conversion will go to the Hindu heirs; but that acquired subsequently, will be distributed according to the law of the new religion.

Authorities.

Menu:—"All those brothers who are addicted to vice, lose their title to the inheritance."

Sancha says:—"The heritable right of one who has been expelled from society, and his competence to offer food and libations of water, are extinct.

There is no authority which enjoins that the children by a Moohummudan woman should be permitted to inherit from their putative father.

* Retirement from the world is, according to the Hindu law, a species of civil death, on which, as in the case of natural dissolution, the rights of the heirs immediately begin to exist.

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"But *Bhrigu* declared, that whatever customary law of a country, a class or tribe, a company of *merchants and the like*, or of a town, should be alleged and proved, the distribution of an inheritance must be respectively made according to that custom."*

Q. 2. A Hindu had two sons, whom he disposed of in marriage to their equals in tribe, rank of life, and condition. The eldest son had a son by his Hindu wife, and subsequently both the brothers became converts to the Moohummudan faith; but the son of the eldest brother and the wife of the second continued to profess their own religion. After conversion, one of the sons (the second) died. Now there are three claimants to his estate, namely, his nephew, his Hindu widow, and his Moohummudan widow. In this case, will the property which he possessed previously to his conversion, devolve on his Hindu widow or on his nephew?

And a Moosulmaun widow of such apostate Hindu will have no right to his previously acquired property.

R. Under the circumstances above stated, if a partition of the estate had been made by the sons of the original proprietor, and they lived apart, the Hindu widow is entitled to the inheritance; and supposing them to have lived together as a joint and undivided family after their conversion, the nephew should be declared entitled to the succession.

Authorities.

"The wife, &c."—*Dáyabhága,* page 160.

Patna Court of Appeal.

CASE V.

Q. 1. Can a daughter who lives in a state of prostitution take her parents' property by right of inheritance?

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* *Cátyáyana.* See Digest, vol. iv, page 77.

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R. 1. A daughter who has given herself up to prostitution, or one who is unchaste, is wholly incompetent to inherit the property left by her parents. An unchaste daughter is excluded from the inheritance.

Q. 2. Supposing that there be no other legal representative of her parents than the unchaste daughter, in this case, does the law admit her as an heir; if not, on whom will the property devolve?

R. 2. She is not entitled to inherit her parents' property, even though there be no person to claim the inheritance. The person who is next in order of succession, if there be any such, shall inherit from her parents; and in default of such heir, (the parents not being of the Brahminical class,) their property will escheat to the king.* And the property will escheat, if there be no other heir.

Zillah 24-Pergunnahs,
February 28th, 1810.

* It will be seen from the above specimens, that questions connected with loss of caste, and consequent privation of the right of inheritance, are not by any means frequently litigated. I do not recollect having met with any others. Were these disqualifying provisions indeed rigidly enforced, it may be apprehended that but very few individuals would be found competent to inherit property, as there is hardly an offence in jurisprudence, or a disease in nosology, that may not be comprehended in some one or other of the classes. A cursory inspection of the subjoined catalogue of disqualifications will suffice to verify this assertion.

According to the Hindu law, an impotent person, one born blind, one born deaf or dumb, or an idiot, or mad, or lame, one who has lost a sense or limb, a leper, one afflicted with obstinate or agonizing diseases, one afflicted with an incurable disease, an outcaste, the offspring of an outcaste, one who has been formally degraded, one who has been expelled from society, a professed enemy to his father, an apostate, a person wearing the token of religious mendicity, a son of a woman married in irregular order, one who illegally acquires wealth, one incapable of transacting business, one who is addicted to vice, one destitute of virtue, a son who has no sacred knowledge, nor courage, nor industry, nor devotion, nor liberality, and who observes not immemorial good customs, one who neglects his duties,

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one who is immersed in vice, and the sons whose affiliation is prohibited in the present age, are incompetent to share the heritage; but these persons, excepting the outcaste and his offspring, are entitled to a suitable provision of food, raiment, and habitation. If their disqualifications be removed subsequently to partition, by medicine or other means, they must have their shares from their co-heirs, according to the same rule as that which authorizes a son born after separation to share the property. The individuals abovementioned are differently defined by several authors; some of the particulars of which have been subjoined.

If the sons of the individuals abovementioned be faultless, or free from similar defects, they must have such share as would have belonged to their father, had he been capable of inheriting. The daughters* of these persons must be supplied with food and raiment until married, and the expenses attendant on their nuptials must also be defrayed out of the estate; and their virtuous widows, being destitute of male issue, must be maintained until death.

CLASS 1. It is laid down in the *Smritiratnavali*, that "according to the doctrine of the *Cámatantra*, the impotent *(Cliva)* is of twenty species," but the definitions of them are not given in that work. Six sorts of *Clivas* are distinguished by *Devala*, as follows:—"The impotents are divided into six heads, namely, *Shándáca*, *Vátaja Shándá*, *Pánda*, *Cliva*, *Napunsaca*, and *Kilaca*. He also explains the terms.†

CLASS 2. According to the best authorities of Hindu law, one who is blind or deaf forfeits his right of succession, provided the blindness or deafness arose from the day of birth; that is, one who was born blind or born deaf, but not whose disqualification arose subsequently to his birth, by disease or similar causes.

CLASS 3. *Jimútavahana* says: "One who is incapable of articulating sounds, is dumb." *Rámnátha* explains it, "One who is deprived of speech." *Mádhavácharjya* and others maintain, that "Idiot and dumb" is a compound term. The author of the *Vivádachandra* interprets it, "One who becomes dumb, through idiotism."

* It is not distinctly stated in the *Dáyabhága*, *Mitácshará*, or other works, whether the daughter of an outcaste is entitled to maintenance or otherwise; but the author of the *Vivádatandava* expressly declares, that the daughter of an outcaste must be maintained.

† The explanations have been given with the most scrupulous attention to minutiæ; but the detail would not be very interesting, nor indeed could it be rendered in an intelligible manner, consistently with delicacy.

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CLASS 4. The term "idiot" is explained by *Jimûtavahana*, "a person not susceptible of instruction." *Raghunandana*, "One who cannot support the performance of duties." Others explain it, "Void of understanding." *Chandeswara*, "Devoid of knowledge of himself, and one whose intellectual faculties are imbecile." The author of the *Vivádachintámani*, "One who is incapable of discrimination." *Misra*, "One who is incompetent to judge between what is beneficial and mischievous." *Rámnátha*, and the authors of the *Dáyanirnaya*, and other authorities, adopt the construction of *Jimûtavahana*. *Vijnyaneswara* explains the term to signify, A person deprived of the internal faculty, meaning one incapable of discriminating.

CLASS 5. According to the doctrine of *Vijnyaneswara*, one affected by any of the various sorts of insanity proceeding from air, bile, or phlegm, from delirium, or from planetary influence, is called mad. The author of the *Dáyabhágavinirnaya* explains the word "mad," One whose mind is imbecile, that is, one who is devoid of the knowledge of determining between what is baneful and what advantageous; but this is rather the state of idiotism.

It is said in the *Vivádabhangárnava*: "One who subsequently becomes insane from the pernicious power of mineral drugs or the like, is not excluded, any more than one who subsequently becomes blind or lame." "Mad:" that is, one who is born mad.

CLASS 6. *Jimûtavahana* ordains, "He who cannot walk on either foot, is lame." This reading is copied by the authors of the *Vivádárnavasetu* and *Dáyabhága Vinirnaya*. *Vijnyaneswara* reads differently. "Lame:" deprived of the use of the feet.

It is said in the *Vivádabhangárnava*, that "according to his (*Jimûtavahana's*) opinion, if one foot can be used in walking, there is no true lameness. He who cannot walk on both his feet, say modern lawyers, is lame: according to their opinion, if both feet can be used in walking, then only is there no lameness: consequently, a man is called lame, even though he can move on one foot. The opinion of *Jimûtavahana* is alone correct; for in the text of *Menu*, the general failure of organs is not signified by the expression, "such as have lost the use of a limb," (literally such as have not their organs:) were that the meaning, one who had only lost the use of his hands, would be capable of inheriting. Logicians do not acknowledge any essential property common to all organs, and peculiar to them; hence a general failure of them *all* cannot be affirmed by a single term; but the general failure of a particular one *may be so affirmed*. That may be the total failure of *power to use* the hands or feet; the total

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failure of the sense of smelling or tasting; the deprivation of sight, *which constitutes* blindness; deprivation of hearing, which *constitutes* deafness; the total failure of the generative organs, which is called impotency; dumbness, or the total failure of speech, which depends upon the tongue.

Jagannátha further observes:—"It should be here remarked, that the term "lame," being in juxtaposition to the word blind, must signify born lame. In like manner, "persons deprived of the use of their hands," must signify such as are destitute of the use of both hands from the day of their birth."

CLASS 7. The term "*Nirindriya*," or one who has lost a sense, is derived from *nir* privative, and *indriya*, an organ of sense. The term *Indriya* is explained by some, a sense, as that of smelling, or of sight, &c., but by others a limb, as the hand, foot, and so forth. The first term is expounded by the author of the *Smritiratnávali* as signifying one who has lost a sense, by disease and the like. Lame and the rest: whose hand and foot are lost by disease.—The *Vivádatandava*. Lame, and so forth.—*Rámanátha*. Some explain the term thus: "One whose generative organ is lost, is called *Nirindriya*, and he is one of those termed impotent." *Vijnyaneswara* explains the term, "Any person who is deprived of an organ (of sense or action) by disease or other cause, is said to have lost that sense or limb." It is said in the *Ratnácara*: "By the mention of *Nirindriya*, or who has lost a sense or limb," persons lame or the like, who are disqualified for acts of religion ordained by revealed and traditional law, are suggested. This explanation is followed in the *Vivádachintamani*, *Vivádabhangárnava*, and other law tracts.

CLASS 8. In the Sanscrit dictionaries, no less than eighteen sorts of leprosy have been enumerated, seven of which are denominated *Mahacushtha*, or great leprosy, and the remaining eleven *C'shudra Cushtha*, or slight leprosy; but according to what may be termed, in this particular, the Hindu medical jurisprudence, there are only eight sorts of leprosy mentioned, as contained in the following passage of the *Bhawishyapurána* quoted in the *Vivádabhangárnava*: "Hear, O priest, the enumeration of various sorts of leprosy, the last worst than the first: blisters on the feet, a deformity in the generative organs, cutaneous fissures, true elephantiasis, ulcers, coppery blotches, black, and eighthly, white leprosy.

Then follows a long dissertation as to who are competent, and who incompetent, and under what circumstances, to inherit, and the conclusion of the argument is given in the following terms.

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"To reconcile the discordant opinions of many wise persons concerning the competence of a leper to inherit, and to perform acts of religion, various modes have been exhibited. But according to both opinions, a man infected with grievous leprosy is in effect capable of inheriting when he has performed penance: according to *Raghunandana* and others, men afflicted with elephantiasis, marasmus, honey-coloured gonorrhœa, black teeth, and other distempers difficultly cured, are incapable of inheritance, so long as penance be unperformed. According to *Váchespati Bhattácharjya*, they are capable of inheritance. *Bhavadeva* holds, that a leper who has not performed penance, *is excluded from succession.*"

CLASS 9. The term "obstinate diseases," is explained to signify atrophy and similar maladies, and the term "agonizing distempers," leprosy and the like.—*Ratnácara.*

CLASS 10. The term "afflicted with an incurable disease" is thus explained by *Vijnyaneswara*, Affected by an irremediable distemper, such as marasmus or the like; and by *Chandeswara*, A hopeless leprosy and the like: the latter is concurred in by the authors of the *Vivádachandra*, *Vivádabhangárnava*, *Dáyabhágavinirnaya*, and other authorities. But *Rámanátha* extends the enumeration much farther. "An incurable disease:" Grievous disease, such as leprosy and so forth. The marasmus, strangury, leprosy, gonorrhœa, enlargement of the abdomen from dropsy or flatulency, fistula in ano, piles, and dysentery, are grievous diseases."

CLASS 11. The term "*patita*" is used to signify a degraded man or an outcaste: it is explained in the *Mitácshará*, One guilty of sacrilege or other heinous crime; and in the *Vivádabhángarnava*, One who has done a criminal act. But *Rámanátha* explains it differently, One who is addicted to crimes of the lowest and the highest degree: he also says, that the term outcaste must be understood, to signify one degraded, and who is averse from performing the penance.

It is said in the *Vivádabhangárnava*, "One degraded for sin, he who has slain priests, or committed some atrocious crime, and who has not performed penance, but on the contrary is averse from it; for *Raghunandana* says, Aversion from penance on the part of the fallen sinner contributes to the forfeiture of his right to his own property. His not being averse from penance, contributes to his right in the paternal estate. But *Vrihaspati Bhattácharjya* affirms, that "aversion from penance is no cause of forfeiting his right in his own estate:" according to his opinion, the matter is not in this case regulated by aversion from penance."

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Class 12. The incompetency of the son of an outcaste to inherit his grandfather's property, must be understood of one who was born after his father's degradation; for he (the son) is degraded, being procreated by an outcaste. This opinion is conformable to the law as current in all schools.

Balambhatta explains the term "son of an outcaste," the son of one who has not performed the requisite penance and expiation.

Class 13. The term "*Apápatritá*" is used for "one who has been formally degraded," in the Digest; and "one who has been expelled from society," in the *Dáyabhága;* but both versions are respected. *Jimūtavahana* explains the term as it is found in the Digest, Excluded from the joint libation of water, and as in the *Dáyabhága*, A person excluded from drinking water in company. This reading is followed in the *Viramitrodáya*, and by *Sricrishna*, *Chadamani*, and others. The meaning of the term is thus given in the *Vivádatándava:* "One expelled by his kinsmen, with the ceremony of kicking down a water-pot, for a crime *in the third degree*, such as killing a *Cshetriya* without malice, or the like." And in the *Vyavaharamayūc'ha*, it is defined as signifying, "One who makes a voyage to an island in a ship or the like for traffic, is a sinner in the third degree, conformably to the text, 'a *Dwija*,* who goes to sea in a ship, must be taken into company after purifying him,'—and one who is expelled by kicking down a water-pot for killing a *Cshetriya*." The distinction between this and the tenth class appears to be, that those comprehended in this class have been formally subjected to the ceremony of degradation, and rather on account of *mala prohibita* than of sinful acts.

Class 14. The term *Oupapatica* signifies, "one who has been expelled from society." This is the term used by *Jimūtavahana*, *Rughunandana*, *Maheswara*, and the authors of the *Vivádárnavasetu*, and other works, but they explain it differently. *Raghunandana* explains the term, "one stained with sin of the third degree." So the *Vivádárnavasetu*. It is recorded, that the cutting of trees or the like is a crime of the third degree; but it must be understood that the term means, "one who is tainted with such crimes of the third degree as create incompetency to perform obsequies or other religious rites." The *Dáyacowmudi*. *Maheswara* expounds it, "one who is addicted to crimes of the third degree, such as attachment to dissolute

* The term "*Dwija*" is explained by *Amera*, a man of either of the three first classes, a *Brahmin*, a *Cshetriya*, or a *Vaisya*, whose investiture with the characteristic string at years of puberty, constitutes religiously and metaphorically their second birth.

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women, and scurrilous acts. But the author of the *Pracása* reads the term *Upapataci*, and adopts *Raghunandana's* explanation. In the *Calpataru* it is read *Apapatrita*. The word is written *Avapataca* in some copies of the *Smritichandricá*, but explained in the same sense.

Class 15. The term, "a professed enemy to his father," is, he who assaults and otherwise maltreats his father while he is living, and after his death, is averse from performing his obsequies.—*Raghunandana*, *Misra*, and the authors of the *Vivádárnavasetu*, *Vivádachandrica*, and other works, concur in this construction.

Class 16. The term *Pravrajyavasita*, which occurs in the original text, is explained by some commentators, to signify one who has assumed the order of a religious anchoret, and by others an apostate from a religious order; and according to the best authorities, one who has entered into an order of devotion forfeits all right of inheritance, whether he remains in the order of a religious anchoret, or quits it to resume that of a housekeeper.

Balambhatta says, that the orders of devotion are, 1st, that of the professed or perpetual student; 2ndly, that of the hermit; 3rd, the last order, or that of the ascetic.

Class 17. The term "*Lingi*" is explained by *Jimūtaváhana*, as a person wearing the token of religious mendicity, and one who has become a religious wanderer, or ascetic; but it is explained by some commentators as intending a fraudulent wearer of sacred marks.

Raghunandana explains it, "one who rigidly practises austerities with an intent to deceive." So do *Chandeswara* and the authors of the *Vivádachintamani*, *Vivádárnavasetu*, *Vivádachandrica*, and other works. But the author of the *Smritichandricá* explains it, "a hypocrite and impostor, or sectary and heretic." It is explained in the *Vyavahāramayūc'ha*, "one who wears a symbol which he is forbidden to wear." *Rámanátha* explains it as signifying *dharma dhwajin*, or one who makes a livelihood by assumed devotion.

Class 18. "The son of a woman married in irregular order:" that is, a son begotten by a priest on a young woman of the military or other tribe, married in breach of that order which is prescribed by the law when damsels of various classes are espoused by one man; that son is not capable of inheriting.

"The son of a woman superior in class, but married to a man of a lower tribe, is not capable of inheritance."

Jimūtavakana ordains: "If a woman of superior tribe be espoused after marrying one of inferior class, both marriages are contrary to regular order."

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Jagannátha says: "He who is born of a woman unequal in rank, but taken in marriage according to the order of the classes, may be heir."

The term "son of a woman married in irregular order," is explained by others, "the son begotten on his wife by a *kinsman legally appointed,* the son of an unmarried girl, and the like." But the author of the *Vivádachandrica* explains it, "a son of a woman married in irregular order."

Nilacántha says: "A woman being married while her elder sister remains unmarried, both the elder and younger sisters are called women married in irregular order."

It is said in the *Vivádachintámani*, that the marriage according to law takes place only with one of the same class; and the woman who is married in breach of that law, is called a woman married in irregular order."

"He is called 'the son of a woman married in irregular order,' whom a person begotten on a woman of unequal rank married in breach of that order which is prescribed by the law when damsels of various classes are espoused by one man. The son of a woman married in irregular order may inherit, provided his mother be equal in class, and the issue born of a woman unequal in rank, but espoused in regular order, may participate." This is *Chandeswara's* exposition, which is concurred in by the authors of the *Vivádabhangárnava*, *Vivádachandrica,* and other authorities. "The son of a woman married in irregular order is unworthy of inheritance; and so is the son of a woman espoused by her kinsmen."—The *Smritichandrica.* "He who is born of a woman of an equal class, but married in an irregular gradation, and also one begotten on a woman of an unequal class, but espoused regularly, are both excluded from participation."—The *Vivádatándava.*

"The son who is born of a woman descended from the same primitive stock *(gotra)* with her husband, is not capable of inheritance." This is the interpretation adopted in the *Vyavahāramayúc'ha*, *Ratnácara*, *Vivádachintámani*, *Vivádachandricá*, &c. On this subject the *Vivádabhangárnava* contains a long argument, to prove that after consummation the marriage is legal, and concludes with a special distinction, that, "since the marriage of a *Sudra* with a woman sprung from the same primitive stock is authorized, the son born of such marriage is capable of inheriting."

Class 19. In the original text, declaring the incompetency of a person who illegally acquires wealth to inherit, the reading is [illegible]

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menadravyani pratipadayati. The term "*pratipádayati*," (acquires,) is explained in the *Vivádárnavasetu* and other works, as signifying "*Arjjáyati*," earns; but others explain it *(vyati,)* dissipates. *Maheswara Tarcálancara* expounds it, "gives to harlots."

The term "illegally" is explained by *Chandeswara* and *Jagannátha*, to mean, By gambling and the like; and By stealing, according to the *Vivádárnavasetu.* It is laid down in the *Ratnácara*, that some hold that "he who dissipates the wealth is capable of inheriting no more than the residue of a share, after deducting so much as has been dissipated by him. But *Jagannátha* states, that so much shall be deducted out of his share as has been expended with no view to the support of the family, to religious duties, and the like.

Class 20. "One incapable of transacting business:" that is, who is ignorant of civil affairs. *Rámanátha.* "Not become capable of civil transactions."—*Vijnyaneswara* and others. The author of the *Smritichandricá* explains the term, "Dumb and the like;" and *Jagannátha* holds that the term may be also explained, "Neglecting civil affairs," and solely devoted to religious affairs.

According to the *Rátnacara*, the term means those not become capable of civil transactions; who should be supplied out of their allotments committed to kinsmen in trust for their use.

Class 21. The term "one who is addicted to vice, is explained by *Jimútaváhana*, "One who is averse from performing his father's obsequies and other acts of religion;" by *Sricrishna*, "One who acts in such a manner as to disqualify himself from the performance of exequial rites," such as cohabiting with a woman whom the law forbids to approach. *Chandeswara* explains the term, devoted to gaming or the like; and they who are disqualified for acts of religion ordained by law, are suggested by the term addicted to vice, and incompetent to share the inheritance; and according to *Culluca-bhatta*, in commenting on this passage, those brethren who are addicted to vice, such as gambling, whoring, and the like, cannot inherit, even though they are not degraded.

Class 22. This disqualification seems to be almost of the same nature as the foregoing one. The term "one who is destitute of virtue," is variously explained, One who is tainted with such vices as render him averse to the performance of ancestral obsequies.—*Maheswara.* "Tainted with those vices which are the reverse of good qualities."—*Raghunandana.* "Corrupted with vicious qualities."—*Achyuta.* "One who is averse from performing obsequies and the like."—The *Calpataru.* "One who is destitute of such qualities as

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may be beneficial to his father in this and the next world."—The *Smritichandricá*.

CLASS 23. It is said in a text of *Vrihaspati:* "A son who has no sacred knowledge, nor courage nor industry, nor devotion, nor liberality, and who observes not immemorial good customs, must be considered as similar to urine and ordure." Upon which *Jagannátha* remarks, that sacred knowledge, courage, and industry, "severally relate to the three first classes :" "devotion" and the rest, concern all tribes." "Immemorial good customs :" the term may be explained, "The practice of virtue to the utmost of his power." It follows, therefore, that a son, even though free from vice, who neglects to fulfil prescribed duties to the utmost of his power, is excluded from participation.

CLASS 24. The term "those who neglect their duties," is explained by *Rámanátha*, "Those who are incapable of duties." *Jagannátha* explains it, "Those who are disqualified for acts of religion, such as sacrifice or the like." Thus a similar term is used in the following verse: "Wealth is conferred for the sake of defraying sacrifices; therefore distribute it among honest persons for that purpose, but not among women, ignorant men, or such as neglect their duties." But here it must be observed, that "ignorant" means, unacquainted with the *gáyatri;* not knowing the sense of that prayer. "One who neglects his duties :" one who performs not the ceremonies enjoined at morning and evening, twilight, and at noon, nor other daily acts of religion. The legislator declares an ignorant man, and one who neglects his duties, incompetent to sacrifice: "Him who neglects solemn rites, the ignorant man, one who is afflicted by a grievous malady, and one who acts according to his mere pleasure, the wise have declared impure even until death."

CLASS 25. "Those who are immersed in vice:" that is, those who are continually occupied in *vyasana*, which is defined by *Rámanátha* as follows:—Hunting, gambling, sleeping in the day, calumny, whoring, drinking, dancing, singing, playing (or music), and idle roaming; these ten arise from desire. Depravity, violence, injury, envy, malice, fraud, abuse, and assault; these eight proceed from anger.

The term "*vyasana*" is explained by *Amera*, "Danger or calamity, falling low or erring, vice proceeding from lust or wrath :" consequently the heir must support those who have fallen off from their duty, that is, who are addicted to gambling and the like; and such as are impelled by vice proceeding from lust, that is, addicted to the society of harlots; and those who are impelled by vice proceeding from

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wrath, or who always design mischief to others: it follows from the maintenance ordained, that they shall be excluded from participation.—*Jagannátha.*

Class 26. According to the Hindu law, the filiation of twelve descriptions of sons, in addition to the son of the body, namely, the son of his wife by a kinsman legally appointed, the son of his appointed daughter, the son given to *him*, the son made or *adopted*, the son of concealed birth, the son rejected, the son of a young woman, the son of a pregnant bride, the son bought, the son by a twice-married woman, the son self-given, and the son by a *Sudra*, was lawful in former ages; but by the law as it exists in the present or *Cali* age, the *Dáttaca* form of adoption is the only form universally recognized as legal. The law as current in the province of *Mithilá*, however, permits the adoption of a son made (*Kurta* or *Kritrima-putra*) The son begotten by a *Sudra* on his slave girl, not married by him, is entitled to participation; and there are other local and peculiar exceptions.

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CHAPTER V.

Of Partition.

CASE I.

Q. Is a person competent to divide his self-acquired landed property between his two sons by his senior wife, having reserved something out of it for his own maintenance, while his junior wife is pregnant, or while there is a possibility of her bearing children?

R. The individual in question is incompetent, without having reserved his legal share, that is, two shares of his wealth, to divide his self-acquisitions, whether real or personal, between his two sons by his elder wife, while his junior wife is pregnant, or while there is a possibility of such wife's bearing children.

A father making a partition among his sons must reserve his legal share, his wife not being past child-bearing.

Authorities.

"Who acts otherwise than the law permits, has no power in the distribution of the estate."

"They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

"If the sons were separated (from the father) while his wife was pregnant, but not known to be so, the son who is

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afterwards born (of that pregnancy) shall receive his share from his brothers."*

Calcutta Court of Appeal.

CASE II.

Q. A *Brahmin,* who was possessed of some consecrated images, rent-free lands, and ancestral and self-acquired lands, had three sons. Previously to his death, he verbally gave the lands and consecrated images to his

* It should not be supposed, that according to the Hindu law as prevalent in Bengal, there is a fixed period for a father's distribution of his own acquired property of whatever description; for the father has exclusive control over his own acquisitions, and he may distribute such property by giving greater, or less, or equal shares to his sons, and may reserve to himself whatever he chooses, whether half, or two shares, or three. His choice alone determines the time of making a partition of his own acquired wealth, and the distribution does not operate to debar a male child born subsequently thereto; for his right still subsists over the paternal estate, as appears from the following passage of the *Dáyabhága:* "If the father, having separated his sons, and having reserved for himself a share according to law, die without being reunited with his sons, then a son who is born after the partition, shall alone take the father's wealth; and that only shall be his allotment. But, if the father die after reuniting himself with some of his sons, that son shall receive his share from the reunited *co-heirs.* If the sons were separated (from the father) while his wife was pregnant, but not known to be so, the son who is afterwards born (of that pregnancy) shall receive his share from his brothers. Not one only, but even many sons, begotten after a partition, shall take exclusively the paternal wealth. "All the wealth which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition." Under the term "all," wealth, however considerable, which is acquired by the father, goes to the son begotten by him after partition." But the followers of the Benares school maintain, that the father is subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor. And in conformity to such opinion it may be held, that a father is incompetent to distribute his self-acquired landed estate until his wife is past child-bearing, though that is not distinctly stated in the *Mitácshará,* in the Chapter treating of the right of one born after partition.

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eldest son, and the rent-free lands to his other two sons. In this case, is there any necessity for the execution of a document to perfect the verbal gift? In other words, should the father have died without executing a written gift, is each of his sons entitled to an equal share of his property?

An unequal distribution made by a father among his sons of self-acquired or moveable property is valid.

R. In this case, it requires no written instrument to perfect the gift, as far as regards the self-acquired property, and the sons are incompetent to disturb the distribution made by the father, even though there be no document forthcoming. They are entitled, however, equally to share the ancestral lands.

Authorities.

Náreda says:—"For such as have been separated by their father with equal, or less allotments of wealth, that is a distribution: for the father is lord of all."

Yájnyawalcya:—"When the father makes a partition, let him separate his sons according to his pleasure."

"When the father makes a partition, let him separate his sons (from himself) at his pleasure, and either dismiss the eldest with the best share, or (if he choose) all may be equal sharers."—*Mitácshará.**

Zillah Jungle Mehals,
May 24*th,* 1811.

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* This, it will be observed, was a Bengal case. Had it occurred elsewhere, the opinion would have been different, the law of Benares and other schools not admitting an unequal distribution of real property, though acquired by the father himself. According to the Hindu law, a writing is merely used *in memoriam rei*, and a written instrument is not essential to the validity of any disposition of property.

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CASE III.

Q. A father distributed his property among his sons, and subsequently to that distribution he wished to take it back from them. In this case, is the distribution revocable by the father?

A father may resume property made over by him to his sons, should he subsequently become indigent.

R. If the father have divided his self-acquisitions among his sons, and subsequently become indigent, he is competent to take back such property, as is expressly declared by a text of *Harita* cited in the *Vivádachintámani:* "A father during his life distributing his property, may retire to the forest, or enter into the order suitable to an aged man; or he may remain at home, having distributed small allotments, and keeping a greater portion: should he become indigent, he may take it back from them."

Zillah Shahabad,
July 15*th*, 1816.

CASE IV.

Q. 1. A person had three sons, the youngest of whom absconded from his family house, and the father went towards Bindrabun to make inquiry after him. His other two sons remained at home. In this case, is the eldest son competent to exercise proprietary right over the landed and other property? Supposing the eldest in this interval to have adjusted the proportion of his father's share of the joint-property by means of arbitration, in this case, is the adjustment complete and binding?

Partition without the father's consent is illegal.

R. 1. In the absence of the father, who proceeded to Bindrabun to inquire after his missing son, the eldest son is competent to manage his assessed lands and his other property, in virtue of which he may exercise proprietary right over it.* But any partition of joint-property made by

* It should not be supposed, from the doctrine laid down in this case, that according to the Hindu law it is a settled maxim, that the

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means of arbitration without the father's permission, cannot be considered as lawful.

Q. 2. If the father, at the time of his proceeding to Bindrabun, verbally left directions with his eldest son to adjust the dispute regarding his share of the immoveable property held in joint-tenancy with his other co-heirs, and he (the eldest son) accordingly did so while he was absent, and the father upon his return be not satisfied with the adjustment, in this case, is such adjustment good and binding?

But, with his consent, binds him, though absent at the time.

R. 2. Supposing the eldest son, in the absence of his father, but with his permission expressed at the time of his proceeding to Bindrabun, to have chosen an arbitrator, and to have received his legal share of the joint-property, separated by means of arbitration, such partition of the estate is good and binding, even though the father after his return wish to recede from it.

Q. 3. A person had an only son, who in the absence of his father having chosen an arbitrator, caused a partition of his father's ancestral immoveable property which was held in joint-tenancy with his other co-heirs; and the

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eldest son is alone entitled to manage his father's estate, and that the other sons are to be debarred from the management. The law authorizes a capable son, whether he be eldest or youngest, to manage the estate; but if each son claim his share of management, he is competent to do so. A son who is capable may assume the management, with the consent of the rest, during the father's absence, or at his death, as appears from the subjoined extract of the *Dáyabhága:* "Is not the eldest son alone entitled to the estate, on the demise of the *co-heirs?* and not the rest of the brethren? Not so: for the right of the eldest (to take charge of the whole) is pronounced dependant on the will of the rest. Thus *Náreda* says: "Let the eldest brother, by consent, support the rest, like a father; or let a younger brother, who is capable, do so: the property of the family depends on ability. By consent of all, even the youngest brother, being capable, may support the rest. Primogeniture is not a positive rule."

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father having returned home dissented from the measure, and shortly after died. The son who caused the partition is still living, and wishes to recede from it. In this case, is he competent to do so, or otherwise?

And without his consent does not bind the son who made it.

R. 3. The partition of the father's joint immoveable and other property made by the award of an arbitrator, during the father's absence, without his express permission, and to which the father after his return did not consent, is illegal; and on the death of the father, if the son who caused it to be made wish to recede, it cannot be considered as good and binding.

Zillah Midnapore,
May 25*th*, 1818.

CASE V.

Property having been given by a man to his four grandsons, and one of them dying, the son of the deceased is entitled to claim partition from his uncles.

Q. Of four brothers, who had received some property, moveable and immoveable, by gift from their maternal grandfather, the eldest died, leaving a son (the complainant), and then their mother died. Subsequently to her death, two of the surviving three brothers died, one leaving a daughter, who was mother of male issue, and the other a widow, as their heirs. A part of the property is in joint-tenancy, and the other portion is separate, and in the exclusive possession of the several individuals specified. The complainant, being the son of the eldest brother, sues for partition of the estate; and the defendant, one of the brothers, admitting the inchoate right of the plaintiff, states, that while he (the defendant) is living, his brother's son cannot have an equal share with him. In this case, is the property a fit subject of partition while one of the four brothers exists, or will the surviving brother be entitled to a superior portion?

R. All the grandsons were equally entitled to the gift of their maternal grandfather; and should one of them die during the lifetime of his mother, leaving a son, his son has

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the exclusive right to the property to which his father was entitled, whether divided or undivided. The following is the doctrine in the *Mitácshará*, *Dáyabhága*, and other books of law. *Vrihaspati:* "All the brethren shall be equal sharers of that which is acquired by them in concert."*

Zillah Hooghly,
April 3rd, 1821.

CASE VI.

Q. Two Hindus were living undivided in respect of food, and in joint enjoyment of the produce of their ancestral *talook*. One of them, by means of borrowed money, purchased some lands. In this case, is the other individual entitled to participate in the lands so purchased?

Land purchased by one co-parcener with borrowed money cannot be claimed by another who was not joining in the transaction.

R. It appears in this case, that one of the individuals above alluded to, while he and his co-parcener were living in the joint-possession of their patrimonial real property, and jointly in respect of food, purchased some lands with borrowed money; but it is not distinctly stated whether the debt was contracted, and the purchase was made, with or without the consent of the co-parcener. Supposing the transaction to have happened with the consent of the other partner, then he is entitled to participate, and must pay the debt proportionally; but, on the other hand, if he was no party to the transaction, the purchaser has an exclusive right to the property, and he is alone bound to liquidate the debt.

City Dacca,
June 21st, 1810.

CASE VII.

Q. 1. Whether, by reason of the father of the appellants having messed jointly with the grandfather of the

* In *Mitácshará*, page 272.

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respondent, at the time he purchased the *zemindaree* and built the house, but without paying any part of the cost, and without there being any joint hereditary funds, the appellants had any claim in law to share in the estate or house?

Property exclusively acquired by one man is not to be shared by his brethren, though messing with him.

R. 1. If the grandfather of the respondent purchased the *zemindaree* singly, with the produce of his separate industry, and without any aid from funds ancestral or paternal, such *zemindaree* is property exclusively his, in which no other can have a right to participate. And if he obtained a *burmotur sunnud* for land in his own name, (which it appears he did,) no one else can participate in it. And supposing him to have built a brick house on ancestral land, with separate funds of his own, even in that case, such house would not be property in which shares might be claimed by any co-parceners he might have: co-parceners in the land, would only have a claim on him for other similar land, equal to their respective shares. Such is the custom, or unwritten law. From the mere circumstance of messing conjointly, co-partnership in property does not follow.

And if one build a house on joint land, the others have no share in it, but only a claim for so much land elsewhere.

Q. 2. Supposing them to have a claim, what would be the share of each? and whether, after the lapse of thirty-eight years, during which the respondent's grandfather and father had been in possession, a claim on the part of the appellants, for separate shares, was maintainable?

Prescription is no bar to partition after any length of time, as far as the fourth in descent.

R. 2. Had the appellants been originally entitled to shares, they could have taken them after thirty-eight years, or after any length of time, as far as the fourth in descent.

Authorities.

The text of *Menu* and *Vishnu*, laid down in the *Dáyabhága*: "What a brother has acquired by his labour, with-

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out using the patrimony, he need not give up without his assent; for it was gained by his own exertion."

Sancha and *Lichita* :—"There is no division of a house or garden *made by one son for himself,* nor of water-pots, ornaments, utensils *for food and the like,* nor of concubines or clothes, nor of water in *pools or wells,* nor of pasture ground and roads: so *said* the lord of created beings."

Devala :—"Partition of heritage among undivided parceners, and a second partition among divided relatives living together *after reunion,* shall extend to the fourth in descent: this is a settled rule."

Sudder Dewanny Adawlut,
September 4th, 1801.

Khodeeram Serma and Ochubanund Serma *v.* Tirlochun, a minor (through his guardian Gooroopershad.)

CASE VIII.

Q. The respondent and appellant being uterine brothers, lived jointly till the month of September 1210, B. S. The respondent (the elder brother) had acquired money by acting as *tahsildar* or collector, *ijaradar* or farmer, and the like capacities; and the appellant also had earned money by acting as a *gomashta* or agent, farmer, and in other employments. They purchased landed property, some in the names of other persons, with their acquisitions, while they were living in a joint state in respect of food. There were no documents to shew, with any accuracy, the proportions in which the parties had respectively contributed to the purchase of the lands in question; but it was clearly established, that the proportion contributed by the respondent was much the more considerable. Under these circumstances, will the estates which had been purchased by both the brothers, without the aid of the patrimony, but with that of their own acquisitions, be equally divided among them, or is the elder brother, with whose money the

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greater part of the estates was purchased, entitled to any superior share; if so, to how much?

Brothers living jointly are entitled to share their acquisitions to the amount of the funds contributed by them respectively.

R. Property acquired by the appellant, living jointly with his brother, without using the paternal estate, becomes his exclusive property: and that purchased by the respondent, earned under the circumstances stated, becomes his own estate. If the property was purchased with a greater share of the respondent's funds, the less sum being contributed by the appellant, while they were living together, each of them is entitled to share the estate, in proportion to the funds respectively contributed by them to the purchase of the property. Whatever property may be ascertained to have been purchased by each of the parties, each is entitled to, and such portion should be considered the exclusive property of each; but where the proportionate contribution of each may not be determined, there is no rule in the law by which the respective shares to which each is entitled, can be ascertained.

Authorities.

Ydjnyawalcya, cited in the *Dáyabhága* and other tracts: "Whatever else is acquired by the co-parcener himself without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the *co-heirs.*" "Shares should be assigned to each person in proportion to the amount of his allotment, be it little or much, which has been used." This is laid down in the *Dáyabhága, Dáyaruhasya,* and other authorities. "Or the same meaning may be deduced from reasoning (without the trouble of inferring the origin of the rule from a lost passage of scripture): That which is acquired by a person, belongs exclusively to him, so long as he lives."—The *Dáyabhága.*

Sudder Dewanny Adawlut,
May 28th, 1811.

Koshul Chukrawutee *v.* Radhanath Chukrawutee.

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CASE IX.

Q. A person having left his family house, proceeded to a foreign country with his maternal uncle, by whose assistance he obtained a situation there. He acquired some landed property in co-parcenary with his uncle above-mentioned, by his own labour and exertions, and at the time of his acquiring such property his father was alive. Subsequently to the acquisition of the estate, his father went and lived with him, being joint in the article of food, for a short time; and then he (the father) having returned home, died. After the acquisition, his two brothers also of the whole blood lived with him for some time, but occasionally they dwelt at their own house. While they resided at their brother's they were joint with respect to food; and while they lived at their own house, their brother (the acquirer) was in the habit of sending them money for their support. Now one of the two brothers claims one-third of his (the acquirer's) property; and in this case, is the claim good and valid?

A man is not obliged to share with his own brethren, (though undivided,) that which he has acquired by his own unassisted means.

R. If the brother (the acquirer) obtained the landed estate by his individual labour, without using the patrimony, his other brothers have no right to his acquisition; as is declared by *Menu*:—"What a brother has acquired by labour or skill, without using the patrimony, he shall not give up without his assent; for it was gained by his own exertion."

Vyása:—"What a man gains by his own ability, without relying on the patrimony, he shall not give up to the co-heirs, nor that which is acquired by learning."

Patna Court of Appeal.

Jumeeyut Lal, Pauper *v.* Huqeequt Rai.

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CASE X.

Q. There were two brothers, who during the lifetime of their father, and while they were living together as an united family, purchased some landed property with their respective separate funds, and retained their respective acquisitions severally, not jointly. On the death of the father, his property was shared equally by his two sons. The property in dispute is that which one of the brothers, since deceased, purchased in the name of his son with his wife's money, while his father was alive, and while they were living in a state of union. In this case, is the surviving brother entitled to claim any share of the property so purchased by the deceased ?

One brother, though of an united family, has no claim to the property of another, if made by separate funds and labour.

R. Under the circumstances above stated, it does not appear that the property in question was acquired either with the funds or labour of the father or of the surviving brother; consequently the brother, though living in a state of union with the acquirer, has no concern with his acquisition.

Authorities.

The following texts are laid down in the *Dáyabhága* and *Mitácshará*: " What a brother has acquired by his labour without using the patrimony, he need not give up to the co-heirs; nor what has been gained by science."

" Whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heir."

Dacca Court of Appeal,
January 18*th*, 1820.

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CASE XI.

Q. Two brothers possessed an eight-anna share of an ancestral dependant *talook,* and lived apart, though the estate continued to be held by them in joint tenancy. The *zemindar* or proprietor of the dependant *talook* seized the whole estate for the arrears due from the other eight-anna share. The elder brother died, leaving a daughter's son by one of his wives, and a widow. The second brother next died, leaving two sons. After the death of the two brothers, the *talook* was still in the *zemindar's* possession. One of the younger brother's sons, and the proprietors of the other eight-anna share, brought an action against the *zemindar* to recover the property in question, while the elder brother's widow was alive; and afterwards settling the matter by compromise with the *zemindar,* were reinstated in the possession of the property, but the whole eight-anna share which belonged to both the brothers, was retained exclusively by the younger brother's sons, who caused the widow of the elder brother to draw up a deed of gift of her husband's share in their favour. It has been proved, that a few days prior to her executing that document, she was in a state of insanity, and that she died eight or nine days after the execution of the deed of gift. Her exequial rites were performed by one of the younger brother's sons. Previously to her making the gift, her husband's grandson in the female line made objections thereto, and presented a petition to the ruling power, setting forth his objections. On the death of the elder brother's widow, his grandson claims his share of the dependant *talook.* In this case is the grandson entitled to any share; if so, to what proportion? Was the widow competent to give away her husband's entire share to his brother's son or not?

R. Of the eight-anna share of the dependant *talook,* in this case, one moiety belonged to the elder, and the

One-fourth, over and above his own share

of a recovered family estate, goes on partition to him who recovered it.

other half to the younger brother; and the *zemindar*, it appears, seized their shares, together with the other eight-anna share, for the rent due from the latter, and the younger brother's son recovered the property. Under these circumstances, a one-anna share out of the four-anna share which appertained to the elder brother will go, on partition of the estate, to the recoverer over and above his own share, and the remaining three-anna share to the grandson. The gift which was made by the widow of the elder brother to her husband's younger brother's son has no validity. This is conformable to the *Dáyabhága*, and other authorities.

City Dacca,
June 25th, 1811.

CASE XII.

Q. Three Hindus (being uterine brothers) live as a joint and undivided family, and acquire some property real and personal, without relying on the patrimony. The eldest brother separates himself from his brothers, and takes the whole of the property exclusively, without coming to any division with his brethren. It appears that the acquisitions of the eldest exceeded those of his brothers. Under these circumstances, how should the property be distributed?

The acquirer takes a double share on partition, where ancestral property has been used in making the acquisition.

R. In this case, the three brothers living in a joint state, acquired the property real and personal by their own respective funds, without relying on the patrimony, and therefore each brother is entitled to a share corresponding to the extent of his separate funds applied by him towards the acquisition. If one of them had acquired it, relying on ancestral joint stock, the acquirer shall have twice as much as the rest; in other words, a double share. Should any one acquire property by dint of his own funds without using the common stock, the acquirer takes the whole acquisition. The authority for this opinion is the following

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doctrine of *Vyása* and *Yájnyawalcya* laid down in the *Dáyabhága*, &c.

"If the joint stock be used, shares should be assigned to each person in proportion to the amount of his allotment, be it little or much, which has been used." "What a man gains by his own ability, without relying on the patrimony, he shall not give up to the co-heirs; nor that which is acquired by learning." "Whatever else is acquired by the co-parcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs." "The brethren participate in that wealth, which one of them gains by valour or the like, using any common property, either a weapon or a vehicle. To him two shares should be given: but the rest share alike."

City of Dacca,
May 12*th*, 1817.

CASE XIII.

Q. A boy received some jewels and other articles as *Yautuca** at the time of his *Annaprásuna*;† and his mother having sold those presents, purchased a landed estate with the produce of the sale in his name. In this case, is his other uterine brother entitled to share it with him?

Land purchased for a boy by means of his *Yautuca*, is not liable to partition.

R. Whatever property (whether consisting of ornaments or other effects) is given as *Yautuca* to a boy, that

* The term "*Yautuca*" signifies anything received at the time of marriage. It is derived from the verb *yu*, to mix, by adding the neuter suffix, as an union of bride and bridegroom takes place at the time of marriage. What is then received is called *Yautuca*; but the term is generally used to signify donations given at the time of each of the *Sanscáras* or ceremonies.

† This is the ceremony of feeding the child with rice, in the sixth or eighth month, or when he has cut his teeth. For an enumeration of the different *Sanscáras*, see note to Colebrooke's Dig., vol. iii., p. 104.

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is to say, presented to him at the period of one of his initiatory ceremonies, such gift is his exclusive and absolute property; consequently his uterine brother has no title to share the property which was purchased by his mother with his funds.

Zillah Midnapore,
November 25th, 1817.

CASE XIV.

Q. A person died, leaving four sons, and some self-acquired landed property. After the father's death, his sons lived together as a joint and undivided family, and they each purchased with their respective acquisitions some lands, which they annexed to the original estate. Under such circumstances, are the four brothers entitled to share the whole property equally, or otherwise?

Property acquired by brothers should be distributed among them according to the labour and funds employed by each.

R. The property acquired by the personal labour and funds of each of the brothers, and annexed to the original estate while they, after the death of their father, were living in a state of union, should there be any means of discriminating how much, either of funds or labour, was contributed by each of the brothers, will be distributed among them, according to their respective contributions.* The ancestral property should, however, be distributed among them equally.

Ramchunder Das *v.* Gungadhur Mahtee.

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* This, however, supposes that the funds used for the acquisition had not been derived from the ancestral estate. In that case the rule is that a double share only goes to the acquiring brother. *Vyása:* "The brethren participate in that wealth which one of them gains by valour or the like, using any common property, either a weapon or a vehicle. To him two shares should be given: but the rest should share alike." Vide the *Dáyabhága*, page 111.

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CASE XV.

Q. A person, living with his half-brother as a joint and undivided family, without having come to a separation, proceeded to a foreign country, where he held an official situation, and purchased some landed property. In this case, is the half-brother, from the circumstance of his living in co-partnership with the acquirer while the acquisition was made, entitled to any portion of the estate; if so, how will the property be shared between them?

A man has no title to share in acquisitions exclusively made by his unseparated brother.

R. Under the circumstances above stated, according to the doctrine contained in the *Dáyabhága* and other law books, the brother of the half blood has no title to participate in the property, from the circumstance of his continuing with the acquirer as a joint and undivided family when the acquisition was made.

April 17*th*, 1815.

CASE XVI.

Q. There were five brothers, one of whom, subsequently to the father's death, obtained a rent-free *Mouza* in his own name, and in the name of one of his brothers, and died, leaving the four brothers above alluded to, and a widow. Does the *Mouza* in question belong to all the brothers, or only to those in whose name the grant of it was drawn out?

The acquisition of a man made by his own means alone is not divisible among his brothers.

R. Whenever property, moveable or immoveable, may have been gained by a parcener without detriment to the paternal estate, such acquisition becomes his sole property, and the other brothers have no right to claim it. Should there have been joint labour and joint funds used, the acquisition must be equally divided among the brothers, as declared by *Menu* and *Yájnyawalcya:* " What a man gains by his own ability, without relying on the patrimony,

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he shall not give up to the coheirs, nor that which is acquired by learning."*

"Whatever else is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the coheirs."

CASE XVII.

Q. Of two brothers, who lived together as a joint and undivided family, the elder died, leaving four sons, and the younger brother and his son are still living. On the death of the elder brother, his four sons and the surviving brother and his son separated in respect of food, but the property continued in joint tenancy. Certain landed property was purchased with the proceeds of the joint estate, as well as with money, which was jointly borrowed, by means of the personal exertions of the parties, in the name of the surviving brother's son. The debt so contracted was liquidated by the proceeds of the joint-property, and the management of the estate newly purchased was wholly confided to the surviving brother's son. In this case, to what proportions of the property is each of the above individuals entitled?

Acquisitions made by a man jointly with his

R. Supposing one of the two undivided brothers to have died, leaving four sons, and the other brother to be

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* A brother (whether he be of the half or whole blood) cannot share the acquisition exclusively made by his brother without the use of the patrimony; but if it were made by the use of joint funds, according to the law as current in Bengal, the acquirer should have twice as much as the rest of his partners: but to any augmentation in the nature of an increment this rule does not apply, and all the brethren share equally. "Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce, or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer."—*Vivádabhangárnava*... *shard*, page 275.

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brother's four sons, by means of joint funds, will be divided into two portions, of which one will be taken by the man himself, and the other be shared equally by the four sons of his brother.

living, with a son, and the family to have subsequently separated in respect of food only, and after the elder brother's death, their property to have been undivided, and landed property to have been acquired by means of their joint funds and labour, in the name of the surviving brother's son, and that son to have managed the estate; in this case, the property will be made into two shares, of which one will go to the four sons of the deceased brother, in right of their father, and the remaining one to the surviving brother. The portion which will go to the four sons of the deceased brother will be equally shared by them. This opinion is consonant to the *Dáyabhága*, *Dáyatatwa*, and other authorities.*

Calcutta Court of Appeal,
June 13*th*, 1814.

CASE XVIII.

Q. A man had two sons, the eldest of whom died before his father, leaving two sons, to whom he bequeathed by Will certain self-acquired property. The father and three brothers of the deceased severally claim a share of the property so bequeathed. Supposing the deceased to have acquired the property solely by his own funds and personal exertions, in this case, are all the claimants entitled to share such acquisitions; and if so, in what proportions? On the other hand, supposing the property to have been acquired with the aid of the father's funds and labour, in this case too, how will the property be divided among the individuals in question? What is the law as to their right of sharing the property, whether living together or separately in respect of food?

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* But it must be understood in this case, that the sons of the deceased brother did not individually contribute anything to the acquisition. The right they derived was from their father, and in virtue of his contribution.

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Property acquired by one of four brothers with the aid of his father's funds and labour, will on partition be made into ten parts, of which five will go to the father, two to the acquirer, and one to each of his brothers: if acquired without any aid, into two parts, the father taking one, and the acquirer one.

R. Of the four brothers, if one (whether he lived jointly with the rest or separately in respect of food) bequeathed his self-acquired property to his two sons, and died before his father; in this case, if the property have been acquired with the aid of the father's funds and personal labour, a moiety of such acquisitions belongs to the father, and the other half will be made into five parts, of which two will go to the acquirer, and one to each of the three brothers. Supposing the property to have been acquired without the aid of the father's funds or labour, in such case the brothers have no right to any share, but the father is entitled to a moiety. In both cases, the acquirer's sons are entitled to the portion to which their father was entitled. This opinion is conformable to the *Dáyabhága*, *Dáyatatwa*, and other authorities. The text of *Cátyáyana* cited in the above authorities: "A father takes either a double share, or a moiety, of his son's acquisition of wealth."

"Here, the father has a moiety of the goods acquired by his son at the charge of his estate; the son who made the acquisition, has two shares; and the rest take one a piece. But, if the father's estate have not been used, he has two shares; the acquirer, as many; and the rest are excluded from participation."—The *Dáyabhága*.

Sudder Dewanny Adawlut.

CASE XIX.

Q. A person instituted a suit in the civil court of *zillah* Bhaugulpore, against four individuals, claiming a fifth out of an eight-anna share of a certain village, and the cause was referred to the Court of the *Sudder Ameen* for decision. The plaintiff presented a petition to this court, stating, that the eight-anna share of the above village was jointly purchased by the defendants and the plaintiff's father, (who were brothers of the whole blood;) but that, at the time of purchase, his father was in a state of insanity, and

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he himself was a minor. Under these circumstances, is he entitled, according to the Hindu law, to any share of the property, or otherwise? It should be remembered, that when the property in question was purchased, the plaintiff's father and the defendants held in joint tenancy, though the former was disturbed in mind, and the plaintiff under age; but he (the plaintiff) has now attained the age of majority, and in this case, is he entitled to one-fifth of the property in question or not?

The son of one of five brothers, though his father was insane, is entitled, on partition, to one-fifth of property acquired by joint funds.

R. If one of the five brothers was mad, and all of them lived together as an undivided family, and the four purchased the property in question with the use of the joint funds belonging to all the five brothers, even though the deed of sale have been drawn out in the names of the four sane brothers only; still, if the plaintiff be free from similar defect, as madness, &c. he is entitled, on partition, to one-fifth of the property. But if the property was purchased without the use of the joint funds, he has no right to share. This opinion is conformable to the *Vivádaratnácara*, *Vivádachintámani*, *Mitácshará*, and other authorities.

Authorities.

The texts of *Devala*, cited in the *Vivádaratnácara* and other authorities:—" On the death of a father *or other owner of property*, neither an impotent man, nor a person afflicted with elephantiasis, nor a madman, nor an idiot, nor one *born* blind, nor one degraded for sin, nor the issue of a degraded man, nor a hypocrite or impostor, shall take any share of his heritage. For such men, except those degraded, let food and clothes be provided; and let the sons of such as have sons, take the shares of their parents, if themselves have no similar disability."

" 'Disability,' which is a cause of being excluded from inheriting."—The *Ratnácara*.

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The text of *Cátyáyana,* cited in the same authorities:— "On a partition by coheirs, all the wealth left by their father, or by his father, and what they themselves have acquired *by their joint efforts,* shall be divided among them."

"'What they themselves have acquired,' excepting that for which there is a cause of severalty." This being the interpretation of the text in the *Ratnácara.*

"The term 'self-acquired' here means, acquired with the use of the father's funds."—The *Vivádachintámani.*

Zillah Bhaugulpore,
July 11*th,* 1821.

CASE XX.

Q. 1. Of three Hindu uterine brothers, living in joint possession of their paternal estate, one acquired a *jageer* or pension in land, and obtained a few villages as a grant from his father-in-law. In this case, will the *jageer* and the villages be shared by all the brothers, or not?

A *jageer* or other grant acquired at the expense of the patrimony, does not belong exclusively to the acquirer.

R. 1. If the *jageer* have been gained at the expense of the patrimony, it must be divided among all the brothers; but if it have been acquired solely by the labour of one brother, without the aid of the paternal estate, in this case, it will not be shared by all the brothers, as it becomes the exclusive property of him who acquired it. So the villages may have been purchased by the father-in-law with his own money, and given by him to his daughter's husband, and in this case they cannot be shared by all the brothers, as *Menu* says: "What a brother has acquired by his labour, without using the patrimony, he need not give up without his assent; for it is gained by his own exertion.

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Q. 2. It appears from the reply to the first question, that if the *jageer* was acquired at the expense of the patrimony, all the brothers are entitled to share. Is it implied, by this mention of the use of the paternal estate, that something out of such estate was actually taken, or that the acquirer having been supported at the expense of the ancestral property, had studied science, by means of which he held a situation and obtained the *jageer ;* and in either of these cases, will the *jageer* be considered to form part of the paternal estate, and be shared by all the brothers ?

Q. 2. According to the Hindu law, any property acquired by an unseparated brother by means of science, which science he was enabled to obtain by assistance from his father's funds, will be participated by his brothers. **Though science should have been the means of acquisition.**

Q. 3. Will the *jageer,* in both cases, that is to say, whether it be acquired with the direct use of the patrimony, or through science gained by its means, be shared by the acquirer and his other brothers in equal portions, or in greater or less portions ?

R. 3. Under both circumstances, the acquirer is entitled to two shares, and the other brothers to a single share each, as *Vrihaspati* says: "He, among them, who has made an acquisition, may take a double portion of it."* **The acquirer taking a double share.**

Patna Court of Appeal,
January 21*st,* 1814.

Aghoree Shewchurnram *v.* Aghoree Kurtaram and another.

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* According to the law as current in Bengal, an acquirer using joint stock has two shares ; but the lawyers whose authorities are current in Benares propound an exception to this maxim, and they ordain an equal division in cases of addition to or improvement of the original property without any separate acquisition, as appears from the following extract from the *Mitácshará :* "Among unseparated

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CASE XXI.

Q. Is it necessary, in the case of coparceners separating themselves from each other, and dividing their joint-property among themselves, to execute a formal deed of partition?

The fact of a partition should be recorded.

R. When coparceners separate themselves in respect of food and property from each other, it is proper to execute a deed of partition or release.

Authorities.

"That *record* of partition which brothers, *or other coheirs*, execute after making a just division by mutual consent, is called the written memorial of the distribution."*

Zillah Burdwan.

CASE XXII.

Q. Twenty-five *beegahs* of land situated in one village, and seven *beegahs* in another village, formed the ancestral estate of the three appellants and of the respondent's husband, these four individuals being descended from the same grandfather. The appellants having lived from the time of the settlement, that is, the year 1197 Fuslee, in the peaceful possession of the twenty-five *beegahs* of land, discharged the

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brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce, or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer."

* In the case of partition, a release or a deed of partition is the best evidence to ascertain it; but if partition was made by the partners without executing any document, it cannot be set aside by any of them on that ground; as, where doubt arises regarding the fact of a partition, there are several sorts of evidence, the particulars of which are mentioned at length in the following note.

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rent due from the estate in their possession as *putteedars* to the proprietor of the village; and the respondent's husband and herself, having done so for the other seven *beegahs* of land, paid the revenue to Government. The appellants are residing in that village in which the twenty-five *beegahs* of land are situated, and the respondent's husband and herself took up their residence in the village in which the seven *beegahs* of land are situated. The appellants brought an action against the respondent, claiming a share of the seven *beegahs* of land, and a judgment for five *beegahs* and five *biswas* of land was passed in their favour. The respondent did not appeal from that decision, but instituted a fresh suit against the appellants, claiming six *beegahs* and five *biswas* of land out of the twenty-five *beegahs* as her husband's legal share, and a decree was passed in her favour. The appellants being dissatisfied with that decision, appealed from it to this court; and it has not been clearly ascertained, that the lands situated in both the villages were formally divided between the appellants and the respondent's husband, agreeably to their respective shares. In this case, is the respondent, according to law, entitled to claim her husband's share out of the twenty-five *beegahs* of land occupied by the appellants, or otherwise?

Partition will be presumed under what circumstances.

R. From the texts of *Yájnyawalcya, Menu, Náreda, Cátyáyana,* and others cited in the *Mitácshará, Veeramitrodaya, Vyavahdramádhava, Vyvahdramayūc'ha,* and other authorities, it would appear, that if the four individuals, being descended from the same grandfather, have not been separated from each other, the widow (the respondent) is only entitled to get her food, raiment, and a house for her residence; but if her husband had been separated from his coparceners, then she is entitled to inherit his property. From its being specified that the rent due from the twenty-five *beegahs* of land was discharged by the appellants, and that

due from the seven *beegahs* of land by the respondent's husband and by herself, it may be inferred, that the respondent's husband lived separated from his coparceners, and discharged the rent due on account of the land in his possession, by reason of a partition of the estate having taken place. It is a rule of law, that if brothers live apart from each other, and partition is alleged to have taken place so long ago, that no writing on the subject or other record can be found, and if it be proved that they for a long time have lived apart, and have been separate with respect to residence and food, the partition will be presumed; and such being the case in this instance, the widow (the respondent) is entitled to her husband's share of the twenty-five *beegahs* of land.*

City Benares,
March 25*th*, 1816.

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* According to the Hindu law, where a doubt exists regarding the fact of partition having been made, this doubt must be solved by having recourse either to the evidence of kinsmen, relations, and other witnesses, by the record of the distribution, by separate transaction of affairs, by separate household establishments, or the like. The following authorities are extracted from the Chapter of the *Dáyatatwa* which treats of dubious partition. *Sancha* ordains: "A doubt having arisen on the question whether a family has been divided or not, and the nearer kinsmen being unable to answer it from their own knowledge, the more distant relations ought to be witnesses."

"Whether a family has been divided or not; on the subject of a distribution of wealth, which has been inherited by a family, and of which a distribution is to be made; and on a doubt whether partition have or have not been made, kinsmen ought to be witnesses: or failure of them, the neighbourhood ought to be the same."

Vrihaspati explains the nature of a written record of partition: "That record of partition which brothers, or other co-heirs, execute after making a just division by mutual consent, is called the written memorial of the distribution."

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CASE XXIII.

Q. A person died, leaving four sons, one of whom separated himself from the rest, and the other three lived together. The brother who separated himself, applied for a division

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The following text of *Vrihaspati* is cited in the *Vyavaháramátrica:* "When a village, a field, and a garden are recorded in the same grant, if any part be occupied, they are all legally possessed."

"Thus on a partition among brothers, whatever village or other land is inserted in a written record of partition, should some part thereof be occupied, and the remainder be not possessed, still the whole land is considered in law as actually possessed, not as property neglected."

Also he says: "In immoveable property obtained by an equitable partition, or by purchase, or inherited from the father, or received from the king, a title is gained by long possession, and lost by silent neglect. Even in property simply obtained, with or without a fair title, which a man has accepted, and quietly possessed unmolested by another, he acquires a title; and in like manner he forfeits one by silent neglect."

By possession, the title over property obtained by an equitable partition, by purchase, and by similar instances, is established, and the silent neglect of the possession constitutes the forfeiture of such property.

Náreda:—"When co-heirs have made a distribution, the acts of giving and receiving cattle, grain, houses, land, household establishments, dressing victuals, religious duties, income, and expenses, are to be considered as separate, and (conversely) as proofs of partition. After separation, but not before it, brothers may become witnesses or sureties for each other, and may reciprocally give and receive, present or make, contracts with each other: but in regard to property separately acquired, they may do so even before partition. Those by whom such acts are publicly done with their separate property, let men consider as divided, even without written evidence."

Consequently *Yajnyawalcya* propounds: "It is declared, that brethren, husband and wife, father and son, cannot become sureties for each other before partition, nor reciprocally lend their joint property, nor give evidence for each other in matters relating to the common stock."

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of the government revenue due on his paternal estate, in proportion to the share which had devolved on him by right of inheritance, and the partition of the produce was made in the interim, but no division of the land took place. One of the three brothers who lived undivided in respect of food and the like, died, and his two associated brothers performed his exequial rites with the produce of the landed estate, being the shares of the deceased and their own. In this case, will a third share of the deceased brother's property devolve on the brother who separated himself and lived apart, or otherwise?

Living apart as to food and habitation, is not considered a separation such as to disqualify from inheritance.

R. If of the four brothers of the whole blood, whose paternal moveable property was divided, but whose immoveable estate was undivided, three lived together, of whom one died, and the associated brothers performed his exequial rites with the joint funds, the other brother who lived apart is entitled to one-third of the deceased brother's share of the paternal undivided immoveable property, even though he may not have joined in the performance of his exequial rites. This opinion is conformable to the doctrine laid down in the text of *Menu* and other sages. *Menu*: "When all the debts and wealth have been justly distributed according to law, any property that may afterwards be discovered shall be subject to a similar distribution." *Devala*: "Next let brothers of the whole blood divide the heritage of him who leaves no male issue."

Menu again says: "Should the eldest or youngest of several brothers be deprived of his allotment at the distribution, or should any one of them die, his share shall not be lost: but his uterine brothers and sisters, and such brothers as were reunited after a separation, shall assemble and divide his share equally."*

* This question was circulated to several jurisdictions of the Upper Provinces. Some of the Hindu law officers delivered their opinions, that the brother who lived apart after separation was excluded from

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CASE XXIV.

Q. 1. There were three uterine brothers, who during the lifetime of their father caused him to make a partition of his entire estate between them, and from that time one brother lived apart, and the other two lived together as an united family. Subsequently to the father's death, one of the united brothers died, leaving no male issue, and his exequial rites were performed by his united brother. In this case, are the surviving brothers equally entitled to his property; or is the brother who lived in a state of union with the deceased, alone entitled to the succession, to the exclusion of the other brother who lived separated?

If reunion be pleaded after partition, there must be distinct evidence to the fact.

R. 1. The brothers having separated, if one of them die without heirs,* his estate shall be equally shared by his brothers, provided there be no particular evidence of a reunion† having taken place between the deceased and the brother with whom he resided till his death. The doctrines for this are laid down in the *Dáyabhága* and other authorities.

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inheriting his deceased brother's property, by those brethren who lived together with the deceased; and in support of their expositions they quoted the doctrines regarding the right of a reunited co-heir. Others of the law officers stated, that the unassociated brother had an equal right of succession, because, in point of fact, no division of the immoveable ancestral property had taken place, by casting lots or other means, at the time when the brother separated, or subsequently to that separation. The discrepancy would appear to have arisen from its not having been distinctly stated, that there was in reality no division of the property, but merely a separation of persons. Association merely in point of food, or messing together, gives no privilege to the brothers so associated over a brother who messes apart, but whose property continues undivided.

* Here, by the mention of "without heirs," it must be understood, that the person died leaving no heir down to the mother.

† *Jugunnátha* explains the term "reunion" by quoting *Jimutavahana's* interpretation of that term, which is noticed by *Raghunandana*,

Yájnyawalcya:—The wife and the daughters, also both parents, brothers likewise."

Menu:—" Of him who leaves no son, the father shall take the inheritance, or the brothers."

Devala:—" Next let brothers of the whole blood divide the heritage of him who leaves no male issue."

Q. 2. If there be evidence of an express and distinct reunion, and one of the reunited brothers die, is the associated brother alone entitled to his estate, or will the unassociated brother share with him?

A reunited brother entirely excludes an unassociated one.

R. 2. Under the circumstances above stated, the associated brother is alone entitled to the succession, to the entire exclusion of the unassociated brother.

Authorities.

Yájnyawalcya:—" A reunited (brother) shall keep the share of his reunited (co-heir), who is deceased."

Zillah Hooghly.

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the author of the *Dáyatatwa*, as follows: " That they only who may be coparceners by birth, (in respect of property acquired by a father, brother, paternal uncle, and the rest,) having made a partition, are reunited by dwelling together in the same house as joint housekeepers, after annulling the former partition, through mutual affection, by a declaration in this form: 'Thy wealth is mine; and that which is mine, is thine.' There is no reunion of any other persons, such as partners in trade, by the simple junction of property. Vol. iv, page 215.

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CHAPTER VI.

Of Adoption.

CASE I.

Q. Is an unmarried person competent to adopt a boy as his son, or otherwise?

R. An unmarried person may, for the purpose of securing his own and his ancestor's funeral oblations of food and water, adopt a boy. **An unmarried person may adopt.**

This is consonant to the *Dattacachandrica, Dattacadarpana,* and other works.

Zillah Jungle Mehals,
May 11*th*, 1826.

CASE II.

Q. 1. Is a woman, on the death of her husband, competent to adopt a son or not?

R. 1. If her husband left directions with her to adopt a boy, and then died, in this case, the widow is authorized by law to receive a son in adoption, but not otherwise. **A widow cannot adopt a son without the permission of her late husband.**

Authorities.

The text of *Vasistha,* cited in the *Vivádachintámani* and *Vivádabhangárṇava*:—"Let not a woman either give or receive a son in adoption, unless with the assent of her husband."

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A posthumous son is entitled to inherit his grandfather's property with his uncles, but not a posthumous daughter, who can only take property actually in the possession of her father before his death.

Q. 2. A person died before his father, leaving a widow in a state of pregnancy, who was subsequently delivered of a child. In this case, is the posthumous child entitled to its father's property?

R. 2. If the son leaving a pregnant wife died before his father, while the family were in a state of union, and the widow subsequently bring forth a son, such son, on the death of his grandfather, is entitled to inherit his father's portion along with his uncles or other heirs; but if the widow bring forth a daughter, she cannot claim a share, because there is no provision in the law that a grand-daughter, whose father's death happened previously to that of her father, may inherit from her grandfather. But supposing the original proprietor to have divided his estate between himself and his deceased son, in this case, the grand-daughter is competent to inherit her father's share.

Authorities.

The text of *Cátyáyana*, cited in the *Dáyatatwa*:—"Should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his *uncle's* son."

Q. 3. Is it customary to enter into any written agreement on the occasion of adopting a boy; and if so, is an adoption in which no writing was executed necessarily null and void?

A written instrument is not necessary to the validity of an adoption.

R. 3. There is no law requiring the execution of a written instrument on the occasion of receiving a boy in adoption, though the practice of resorting to writing is prevalent. If a person, having performed the ceremonies prescribed for adoption, affiliate a boy whose age does not exceed five years, without having recourse to any written

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instrument, and the parents of the boy, with their own free-will, give the boy for the purpose of affiliation, in such case, the adoption is good and legal.

The passage quoted in the *Vivádárnavasetu* and *Vivádabhangárnava*:—"But after their fifth* year, O king, sons given and the rest must not be adopted: let the adopter

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* It should be here remarked, that the mention of the "fifth year" does not appear to be absolutely restrictive, or intended to fix a limit of age beyond which an adoption would be illegal. The subject has been discussed at considerable length in the following note of Mr. Colebrooke, which is to be found in his translation of the *Mitácsharà*. "*Raghunandana* in the *Udváhatatwa*, has quoted a passage from the *Cálica purána*, which with the text of *Vasishtha*, constitutes the groundwork of the law of adoption, as received by his followers. They construe the passage as an unqualified prohibition of the adoption of a youth or child whose age exceeds five years, and especially one whose initiation is advanced beyond the ceremony of tonsure. This is not admitted as a rigid maxim by writers in other schools of law; and the authenticity of the passage itself is contested by some, and particularly by the author of the *Vyavahàramayúc'ha*, who observes truly, that it is wanting in many copies of the *Cálica purána*. Others allowing the text to be genuine, explain it in a sense more consonant to the general practice, which permits the adoption of a relation, if not of a stranger, more advanced both in age, and in progress of initiation. The following version of the passage conforms with the interpretation given of it by *Nanda Pandita* in the *Dattacamímángsá*: 'Sons given and the rest, though sprung from the seed of another, yet being duly initiated by the adoption under his own family name, become sons of the adoptive parent. A son having been regularly initiated under the family name of his natural father, unto the ceremony of tonsure, does not become the son of another man. When indeed the ceremony of tonsure and other rites of initiation are performed by the adopter under his own family name, then only can sons given and the rest be considered as issue: else they are termed slaves. After their fifth year, O king, sons are not to be adopted. But having taken a boy five years old, the adopter should first perform the sacrifice for male issue.'"

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take a boy five years old, and first perform a sacrifice for male offspring."*

Zillah Nuddea,
September 20th, 1810.

Kissenkant Goswamee *v.* Purmanund Goswamee.

CASE III.

Q. A man had two sons, the eldest of whom died, and subsequently to his death, the father gave his second son for adoption to the brother of his wife. Excepting those sons, he had no other issue; and, in this case, is it legal to adopt such son?

An only son cannot be given in adoption.

R. Under the circumstances above stated, in default of a third son or a son's son, the gift of the second son, after the death of the elder, must be considered as illegal.†

* And the following is a quotation from the remark of the Sudder Dewanny Adawlut in the case of Kerut Narain *versus* Bhobineeree, decided in 1806. " A passage cited as an authority of law by the Hindu writers, whose works are current in Bengal, expresses, that after the fifth year, a child should not be adopted by any of the forms of adoption; but that a person desirous of making an adoption, should take a child of an age not exceeding five years. On this passage a question arose, whether the limitation of age was to be understood as positive, and constituting an indispensable requisite to the validity of the adoption, or whether it admitted of any latitude of construction: In other provinces, and even in Bengal, if the adoption be of a near relation on the paternal side, no difficulty would occur, as the adoption of a brother's son, or other nearest relation of the husband, would be unquestionably valid at an age much exceeding that specified. But in Bengal, where the adoption of strangers to the family is practised, the settled doctrine is, that the boy's age must be such, that his initiation, the principal ceremony of which is tonsure, may be yet performed in the adopter's name and family."

† According to the general prohibitory rule, " by him who has one son only, the gift of that son is not legal." *Cuvaira Bhatta* says : The gift of a son by a man who has two sons, must not be made; for he, having quoted the text of *Saunaca*, (" By a man having several sons, the gift of a son is to be made, on account of difficulty,") &c.

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CASE IV.

Q. Is it allowable, according to the law as current in Behar, to adopt an only son?

R. According to the law as current in Behar, the adoption in the *Dattaca* form of an only child is illegal, as the gift and acceptance of an only son are both prohibited, without which formalities a *Dattaca* adoption cannot be carried into effect.

An only son cannot be adopted according to the *Dattaca* form.

Authorities.

"Let no man give or accept an only son, since he must remain to raise up progeny for the obsequies of ancestors; nor let a woman give or accept a son, unless with the

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serves, that on the death of the other son, the lineage would be extinct. This opinion is concurred in by the authors of the *Vaijayanti* and *Dattacamimangsá:* "By no man, having an only son, is the gift of a son to be ever made." From this expression, the gift by one having two sons, being inferrible: this part of the text ('By one having several sons, &c.') is subjoined, to prohibit the same, by one having two sons also."—It must be here remarked, that the prohibition of giving a son by a father of two sons, does not extend to avoid the gift of a son, made by a person who has a son or a son's son, or two grandsons, in addition to him who is given; for by parity of reasoning, no extinction of the lineage would occur, if in addition to a son, he have a son's son or two grandsons living, as the term "son" means son, son's son, and son's grandson. If this were the construction, it would follow, that a man having a grandson or great-grandson might adopt a son. It will be observed, that the answer is not directly in point. The question was, is it legal to *adopt* a son under such circumstances? and the reply states that, it is illegal under such circumstances to *give away* a son in adoption; but, in fact, the prohibitory injunction applies as well to the giving as to the receiving; the giver of an only son being considered as parting not only with the sole means of evading eternal torment *himself*, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect.

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assent of her lord." *Vasishtha,* cited in the *Dattacamimángsá* and *Dattacachandricá.*

Sudder Dewanny Adawlut,
May 14*th*, 1823.

Nundram and others *v.* Kashee Pandee and others.

CASE V.

Q. A person previously to his death left directions with his wife, who was then under age, to adopt a son for him while his other brothers were alive. In this case, was he at liberty to desire his wife to adopt a son, though his brothers were living?

A widow being a minor, may adopt a son under instructions from her late husband, though her husband's brothers are living.

R. If the deceased previously to his death, and during the lifetime of his brothers, left directions with his wife to accept a son in adoption, and subsequently died, on his death, the directions so given should be considered legal for the purpose of affiliation. The non-age of his widow and the existence of his brothers are, according to law, no obstacle to the adoption. This opinion is conformable to the doctrines of *Menu,* the *Vyavahàratatwa,* the *Dattacamimángsá,* and other law books.

City Moorshedabad,
March 19*th*, 1815.

Haradhun Rai, agent of Surbamungula *v.* Biswanath Rai and others.

CASE VI.

Q. A woman having obtained her deceased husband's sanction to adopt a son, a person executed an instrument, purporting to give his son to her for adoption; and she having accepted this instrument, was ready to perform the ceremonies prescribed for adoption. In the interim, the father of the boy carried him away from the place, and initiated him by the ceremony of tonsure, without the consent of the widow, who having received this intelligence, at first refus-

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ed to accept the boy for the purpose of adoption, and looked out for another; but ultimately she adopted the boy whose tonsure was performed by his natural father. Under these circumstances, is the adoption legal and valid?

R. Supposing that the father, after the widow's acceptance of the instrument executed by him to give the boy to her for adoption, carried him to another place, and performed the ceremony of tonsure under the family name of the adopting father without the widow's sanction, the adoption is nevertheless legal, if he be her near kinsman (*Sapinda*), and if the widow performed the sacrament of the *Homa* and the ceremonies prescribed for adoption. If, on the other hand, the father of the boy performed the ceremony of tonsure under the names of his own father and other ancestors, the adoption would be illegal.

A boy may be adopted after tonsure by the natural father in the name of the adopter.

Zillah Rungpore,
September 28th, 1815.

CASE VII.

Q. A person having left directions with his wife to make an adoption, died, and, subsequently, his widow, at one and the same time, adopted two sons; in this case, is the adoption of both, or either, good and valid?

R. If a childless person, from religious motives, desire his wife to adopt a son, the child so adopted becomes the substitute of a legitimate son. The widow is with such permission competent to adopt. From the direction of the husband, as it is stated in the question, he evidently considered that one substituted son would be sufficient for the peformance of religious ceremonies. Consequently, in obedience to such order, the widow cannot adopt two sons at the same time, and the second adoption is illegal.

A widow, having received instructions from her husband to adopt a son, cannot make two adoptions at the same time. The one made secondly will be invalid.

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Authorities.

"A son of any description, must be anxiously adopted by one who has none: for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name."

In the text, the word ".son" is in the singular number: the author of the *Dwaitanirnaya* construes this as forbidding many adoptions, &c. *Menu:* "Sages declare these eleven sons, (the son of the wife and the rest,) as specified to be substitutes for the real legitimate son; for the obsequies would fail, (*Kriyalopat.*)"

Dacca Court of Appeal,
April 30th, 1813.

CASE VIII.

2. A Brahmin had four sons, one of whom died childless before him. Subsequently to his death, the father took the elder son of one of his surviving sons, and gave him to the widow of his deceased son to be taken by her in adoption. In this case, is such adopted son declared by law an heir to the deceased, or not?

A woman cannot adopt a son *(Dattaca)* without the permission of her husband, nor can an only son or the eldest son be given in adoption.

R. A widow is incompetent to adopt a son; and if she has sons, she cannot give one of them to any one. Whatsoever person has an only son, such son cannot be given in adoption; and whatsoever person has many sons, the eldest son should not be given.

Vasishtha says: "Let not a woman either give or receive a son in adoption, unless with the assent of her husband."

So also: "Let no man give or accept an only son."

Where there are many sons, the eldest of them shall not be given for affiliation. *Menu*: "By the eldest, as soon as

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born, a man becomes father of male issue, and is exonerated from the debt to his ancestors."

Zillah Bundelkhund,
April 14th, 1816.

CASE IX.

Q. Is a son given *(Dattaca)* entitled to inherit from his natural father?

R. A given son has no right to succeed to his natural parents, as *Menu* says: "A given son must never claim the family and estate of his natural father. The funeral cake follows the family and estate; but of him who has given away his son, the obsequies fail." A son given *(Dattaca)* cannot inherit his own father's property.

Zillah Shahabad,
May 13th, 1816.

CASE X.

Q. 1. If a woman, asserting that she had received permission from her husband to adopt a son, shall make such adoption, and the granting of the permission be not supported by any other evidence besides her assertion, is the adoption legal? A woman's assertion that she had been authorized by her late husband to adopt a son, is not sufficient proof.

R. 1. If the woman state herself to have been authorized by her husband to adopt a boy, and the sanction be not proved by the testimony of witnesses or other evidence, the adoption in such case is not legal.

Authorities.

"Let not a woman either give or receive a son in adoption, unless with the assent of her husband." *Vasishtha,* cited in the *Dattacachandrica* and other authorities.

Q. 2. If a dispute arise between an adopted son and his adopting mother, and, to decide it, the adopted son execute An adopted son may lawfully bind him-

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self not to take possession of the estate until after his adopting mother's death, and to forfeit it on breach of the condition.

an agreement of the following purport, that his mother is to remain in possession of the landed property during her lifetime, and that he is to inherit after her only on the following condition: that should any serious difference occur between his mother and himself, he is to lose all his rights, and his adoption to be held void; does such document, on the occurrence of any difference between them, confer a legal right on the mother to disinherit the adopted son?

R. 2. Under the circumstances stated, such agreement does confer the right alluded to on the mother, because the owner of any possessions may dispose of them as he pleases. This opinion is conformable to the *Dáyabhága*, *Vivádabhangárnava*, *Vivádárnavasetu*, and other tracts.

Authorities.

The text of *Náreda* cited in the above authorities: "Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."

Musst. Taramunee Dibia *v.* Debnarain Rai and Bishenpershad.

Sudder Dewanny Adawlut,
January 14*th*, 1824.

CASE XI.

Q. An inhabitant of *zillah* Shahabad, (being childless at the time,) took his brother's son, and made him his adopted son. Subsequently to the adoption, a son was born to the adopting father. In this case, on the death of the adopting father, to what proportions of the property left by the deceased is each of the sons entitled?

An adopted, sharing with a son of the body, is entitled to a fourth.

R. Under the circumstances stated, the property should be divided into four shares, three of which will be taken by the son of the body, and the remaining one by the adopted

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son. This opinion is conformable to the *Mitácshará*, *Dattacamimángsá*, and other authorities, as current in the district of Shahabad, &c.*

Authorities.

The text of *Vasishtha*, cited in the above authorities: "When a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part."

Sudder Dewanny Adawlut.

.CASE XII

Q. A person was survived by his five sons, A, B, C, D and E, who enjoyed their father's estate in joint tenancy; and then A and C died childless, but the latter left a widow. Subsequently to their death, the three surviving brothers, B, D and E, having made a division of the property in equal portions among themselves, lived apart; and after such partition B and E died, the former leaving two sons, and the latter a widow and a daughter's son, whose adoption by his maternal grandfather, E, has been proved by unquestionable testimony. After E's death, his widow and daughter's son took possession of one-third of the original proprietor's property, that is, E's legal share, and exercised the right of ownership over it for the space of four years; now D and B's two sons oust them from the estate. In this case, are E's widow and daughter's son entitled to any share of the original proprietor's property, or otherwise? Supposing E not to have adopted his daughter's son, is such grandson entitled to inherit from his maternal grandfather?

* This is the proportion to which the adopted son is entitled, according to the law of Benares; but according to the law of Bengal, he may claim a third.

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A daughter's son may be adopted in preference to a brother's son; but see note.

R. If, of the separated brothers, the youngest, having taken his daughter's son in adoption, died, such adopted son is alone entitled to the property to which the deceased was entitled.

"All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten: but should a true legitimate son be afterwards born, they have no right of primogeniture. These twelve sons have been propounded for the purpose of offspring: being sons begotten by a man himself, or procreated by another man, or received (for adoption), or voluntarily given."—The two texts of *Devala.*

"Among these, the next in order is heir, and presents funeral oblations on failure of the preceding."—*Yájnyawalcya.*

The daughter's son inherits after the daughter.

If the daughter's son should not have been received in adoption, in the first instance E's property will go to his widow, and in default of her, to the heir who is next in order.

"The wife and the daughters," &c.—*Yájnyawalcya.*

Vishnu:—"The wealth of him who leaves no male issue goes to his wife."

The daughter's son is an heir, and property devolves on him according to the order of succession.

"Let the daughter's son take the whole estate of his grandfather who leaves no (other) son, and let him offer two funeral oblations; one to his own father, the other to his maternal grandfather." "If one die, leaving neither son nor grandson, the daughter's son shall inherit the estate; for, by consent of all, the son's son and the daughter's son

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are alike in respect of the celebration of obsequies."—*Menu* and *Vishnu.**

Zillah Mirzapore,
July 18*th*, 1808.

CASE XIII.

Q. A person named Sheonath, an inhabitant of Bengal, and proprietor of half an ancestral landed estate, died in the year 1204 B. S., leaving a pregnant widow by name Bhuguvutee, and an uterine brother named Govindpershad; in the same year his widow brought forth a daughter, which was named Gunga Mya; the widow died in 1207 B. S. Gunga Mya, in the year 1217 B. S. was married to a person called Ramkishub Dutt. Govindpershad, the original proprietor's brother, died in the year 1218 B. S., leaving Kishenkishore a son, and Daya Mya a daughter. In the year 1226 B. S., Râmkishub Dutt, the husband of Gunga Mya, died childless. Whether, on the death of the original

* "The *reverend Saunaca Muni* (as he is called by *Goverdhana*) says, *Brahmins* should adopt sons from among their own *Sapindas*, and on failure of *Sapindas*, from among those not *Sapindas*. Among *Sapindas*, the brother's son is to be considered as the best. If a brother's son does not exist, a *Sapinda* who is also a *Sagotra* is to be chosen. If such is not to be found, a *Sapinda* not a *Sagotra*. If such is not to be found, a *Sagotra* not a *Sapinda*; and if such is not to be found one neither a *Sagotra*, nor a *Sapinda*. *But in no case, a sister's or a daughter's son*, or those whom *common sense* prohibits the *adoption* of, such as a *brother*, a *paternal uncle*, or a *maternal uncle*. Among the three classes, i. e. *Brahmin*, *Cshetria*, and *Vaisya*, adoptions should be made of one of the same class. *The son who was not the first born* is to be given in adoption. Among the *Sudras*, the adoption of a sister's son and daughter's son is valid."—Considerations on Hindu Law, page 150.

The above extract is, I take it, a true exposition of the law of adoption; and we must suppose, though it is not distinctly stated, that the parties in the case which gave rise to the question in this instance were *Sudras*; otherwise the reply does not seem consonant to law.

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proprietor, was his widow Bhuguvutee, or his brother Govindpershad, entitled to inherit his estate? If the widow was the proper heir, whether was Govindpershad or her daughter Gunga Mya entitled to inherit the estate on her death? If the daughter was the proper heir, and if she by consent of her husband adopted a son, was such adopted son entitled to inherit the estate on her death; and if he was not, who was the proper heir on whom the estate should devolve after the death of Gunga Mya?

Ancestral property which had devolved on a daughter will not at her death go to her adopted son, but to the heirs of her father.

R. On the death of Sheonath, his property belonged, of right, to his widow Bhuguvutee, and not to his brother Govindpershad; for the estate of him who dies leaving no other heir down to a great-grandson, devolves by the law of inheritance on his widow. On the death of Bhuguvutee, the estate which she had inherited from her husband should devolve on her daughter, who was unmarried at the time of her husband's death, and not on the brother of Sheonath; for, by the law of inheritance, of the three descriptions of daughters, that is, the unmarried daughter, she whose husband is living, and of whom there is probability of a son being born, and the daughter who has borne a son, the first mentioned has the best title to the succession, in default of other preferable heirs; but the son adopted by Gunga Mya, by the consent of her husband, has no title to the estate to which she had succeeded, because, according to the *Dáyabhága,* an adopted son has no legal claim to the property of a *Bandhu* or cognate; and according to the interpretation of the text of *Menu,* which admits adopted sons to the right of succession collaterally, the meaning is, succession to the property of persons belonging to the same family as the adopting father, as fully appears from the *Manwartha Mooktávalee,* compiled by *Cullucabhatta,* and other authorities. On the death of Gunga Mya, therefore, the estate left by her father, to which she had succeeded on the death of her mother, and her right to which was limit-

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ed to a life interest, should devolve on Kishenkishore, the brother's son of her husband, because when an estate devolves on a childless widow, who is held to be half the body of her husband, it reverts at her death to the heirs of her husband. So an estate which had devolved on a daughter, who has a weaker claim, should, *a fortiori*, revert to the heirs of her father.

Authority. The text of *Yájnyawalcya,* cited in the *Dáyabhága* and other law tracts: "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates, &c.—(*Dáyabhága,* page 160.)

Sudder Dewanny Adawlut,
September 1*st,* 1821.

Gunga Mya *v.* Kishenkishore Chowdhry and others.

CASE XIV.

Q. 1. A, the proprietor of a *raj* and *zemindaree,* died leaving three sons, B, C and D. His estate descended entire to his eldest son B. B died leaving a son E, on whom the estate devolved entire. C died leaving two sons, F and G, the former of whom died before E. D died leaving a son, H, who also died before E. G has a son, I. E died childless, and on his death his widow, J, took possession of the estate, and without his permission adopted a son, K (the father of L), obtaining, however, the consent of her husband's relations, under whose control she was living. On her death, I, the son of G, claims possession, as heir to her husband, E. Is the adoption by J legal or illegal; and by virtue of it does the estate in question go to K, the son so adopted, and his heirs?

R. 1. Although according to the *Viramitrodaya* and *Vyavahára Koustubha,* the adoption of a son by a widow, having obtained the consent of her husband's relations, has

The adoption by a widow of a son, without the express permission of her

husband, is illegal. The consent of her husband's heirs is not sufficient, according to the law of Benares.

been declared valid, yet as this doctrine has been refuted in the *Dattacamimángsá*, the adoption of K, the father of L, by J, the widow of E, without the consent of E, as admitted by J, is illegal, according to the authority of the *Dattacamimángsá*, which is current in Gorukhpore.

Authorities.

Authority for the above opinion.

1st. Accordingly *Vasishtha* ordains: "Let not a woman give or receive a son in adoption, unless with the assent of her husband." From this the incompetency of the widow is deduced, where the assent of her husband is impossible. Nor should it be argued, that the assent of the husband is only requisite for a woman whose husband is living, on the principle of her being subject to his control, but not so for a widow; because mention is made of women generally, and dependency on control is not the cause assigned. Her dependency on control has been declared in another text: "On default (of her husband), her kinsmen," &c. Should it be argued, that she may adopt a son with the consent of the kinsmen, that is wrong, for the term husband would be irrelevant, and the purpose would not be attained. Now the purpose of the husband's sanction is, that the filiation as son of the husband may be complete, even by means of an adoption made by the wife.—*Dattacamimángsá.*

Q. 2. If the adoption of K is illegal, to whom among the descendants of A does the ancestral estate belong, after the death of J, who has lately deceased?

The cousin of her husband, that is to say, the son of his father's brother, is heir on the death of the widow, to the ancestral estate

R. 2. As the adoption of K has been shewn to be illegal according to the *Dattacamimángsá*, the estate of E, which had descended to him entire from B and A, will go to G, the second son of C, and grandson of A, from the circumstance of C and D, the two younger sons of A, and F, the

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elder son of C, and H the son of D, having died before E,* and on the death of G it will go to his son I. This opinion is delivered in conformity to the *Mitácshará*, which is current in Gorukhpore.

which had devolved on her, provided there be no nearer relation of the husband.

Authorities.

1st.—"To the nearest *Sapinda* the inheritance next belongs."—Text of *Menu*, cited in the *Mitácshará*.

Authority for the above opinion.

2nd.—"Gentiles are, the paternal grandmother, and relations connected by funeral oblations of food and libations of water. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons; on failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of kindred belonging to the same general family, and connected by funeral oblations. If there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food: or else as far as the limits of knowledge as to birth and name extend. Interpretation by the author of the *Mitácshará* of the text of *Yájnyawalcya:* "The wife and the daughters, also both parents, and brothers likewise, and their sons, gentiles, cognates," &c.—*Mitácshará*.

Ditto.

Ditto.

Q. 3. Is M, the widow of I, (who has lately deceased,) entitled to retain possession of the estate during her lifetime?

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* The cousin on the father's side is the seventeenth in the order of succession. In this case the widow, J, had no right to possession during her lifetime; but the question of her title was not agitated, she being dead.

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And is N, the only son of O, entitled to succeed to the estate either during the lifetime of M, or after her death, in right of his adoption?

THE FOLLOWING IS A SKETCH OF THE FAMILY IN THIS CASE.

Propositus.

A.
Bodhmul.

B. Bhowanee. — C. Luchmun. — D. Anund.

J. Bukht Koonwur. ☞ E. Bheem. — F. Kishenpersaud. — G. Sheo. — H. Govind.

K. Adopted son Pertaub. — I. Ajeet. ☞ M. Debraj Koonwur, *Respt.*

L. Shumsheer, *Appt.* — N. Adopted son.

O. Tejmul, only son of Sreejeet.

According to the law of Benares a widow has no right of succession to the undivided property of her deceased husband.

The adoption of an only son is invalid.

R. 3. Now after the death of I, his widow, M, is not entitled to retain possession of the estate during her lifetime, which descended to him entire, because according to the law,* the widow is only entitled to the divided property, moveable and immoveable, left by her husband. The law forbids the giving and receiving, in adoption, of an only son. If, therefore, O gave his son N to I for the purpose of adoption, and I, in concert with M, adopted him accordingly, such adoption is not valid, and N had no right to succeed to the undivided immoveable estate left by I, either during the lifetime of M, or after her death. If O gave his son N to be adopted by I, with the stipulation that he should be a son of both, and I received him accordingly, and adopted him with the necessary ceremonies, then such affiliation

* This constitutes the grand difference between the law of Bengal and the law of Benares relative to a widow's succession to her childless husband's estate, the former admitting it in all cases, whether the estate is divided or undivided, and the latter only in the case of a divided estate.

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is termed the *Dwamushyayuna* form of adoption, which signifies, that the person adopted is the son both of the giver and receiver. Such adoption is allowable according to the *Dattacamimángsá*, which is current in Gorukhpore; and N, being the *Dwamushyayuna* son of I, by means of such adoption will take the estate of I, even during the life-time of M, his widow. This opinion is delivered in conformity to the *Mitácshará*, the *Dattacamimángsá*, and other authorities current in Gorukhpore.

Unless according to the *Dwamushyayuna* form of adoption, by which the person affiliated is considered to be the son both of his natural and his adoptive father.

Authorities.

1st. "When a man who was separated from his coheirs, and not reunited with them, dies, leaving no male issue, his widow, if chaste, takes the estate in the first instance." —*Mitácshará.*

2nd. "Let no man give or accept an only son, for he is destined to continue the line of his ancestors." Text of *Vasishtha*, cited in the *Mitácshará*, *Dattacamimángsá* and other authorities.

3rd. "By no man having an only son is the gift of a son to be ever made."—Text of *Sounaca*, cited in the *Dattacamimángsá.*

4th. "But the father has not authority to give away or sell a son." This text relates to the case of an only son. —*Dattacamimángsá.*

5th. Accordingly, given sons and the rest (who are sons of two fathers) are of two descriptions, perfect *Dwamushyayunas* and imperfect *Dwamushyayunas.* Those are called perfect who are adopted after this stipulation between the natural and adoptive fathers, "This is son of us two." The imperfect are those who are initiated by

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their natural father in ceremonies ending with that of tonsure, and by the adoptive father in those commencing with the investiture of the characteristic thread: since they are initiated under the family names of both, they are sons of two fathers; but imperfectly so.—*Dattacamimángsá.*

6th. Those who present the funeral oblation take the inheritance in the order of propinquity.—*Mitácshará.*

7th. Of these twelve sons abovementioned, on failure of the first respectively, the next in order as enumerated must be considered to be the giver of the funeral oblation or performer of obsequies, and taker of a share or successor to the effects.—*Mitácshará.*

Q. 4. And if not, that is to say, supposing such adoption to be invalid, and the widow M, to have the right of possession during her lifetime, which among the descendants of A will succeed after her death?

An answer to these questions is required to be delivered according to the law of Gorukhpore.

The nearest heir of her husband will succeed to the estate of a widow which had devolved on her at her husband's death.

R. 4. After the death of M, supposing her to have the right of possession during her lifetime, and the adoption of N to be invalid, the nearest heir (of her husband) alive at the time of her death will succeed. The authority for this is similar to that adduced in answer to the third question.

Sudder Dewanny Adawlut,
3rd January 1815.

Rajah Shumsheer Mul, appellant *v.* Ranee Dilraj Koonwur, respondent.

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CASE XV.

Q. 1. A person of the *Cait* class adopted the second son of a person distantly related to him by the paternal side, such person having no other son living at the time when the adoption was made. In this case, is the adoption legal, or otherwise?

R. 1. Under the circumstances stated, the adoption is illegal, according to the text of *Vasishtha:* "An only son let no man give or accept," &c., &c.

The only son of a distant relation cannot be received in adoption.

Q. 2. If the son of a person by his senior wife be dead, and subsequently another son be born to him of his junior wife; in such case, is the son subsequently born substituted for the elder son, and consequently not a fit subject to be given or received in adoption?

R. 2. If after the death of the son by the senior wife, the junior wife have brought forth a son, such second son is considered in the light of a first born, it being assigned to him to perform the duties of primogeniture. Therefore such son cannot be given in adoption or affiliated by another individual.

Nor the eldest son living, though not the first born.

Zillah Sarun,
January 7th, 1809.

CASE XVI.

Q. 1. Is a woman of the *Brahminical* class (inhabitant of *Tirhoot*) competent, without her husband's permission, to adopt a son as her *Kurtapootra,* with a view of securing the due performance of her exequial rites? Supposing her to have once adopted such a son, and subsequently to disclaim the adoption, in this case, can such adoption be considered as good and binding?

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A widow (inhabitant of Tirhoot) may adopt a *Kritrima* son without her husband's permission.

R. 1. The childless wife of a *Brahmin* in *Tirhoot* is competent to adopt a person of her own class as her *Kurta* or *Kritrimapootra,* for the performance of her exequial rites, even though she may not have been authorized so to do by her husband. *Menu:* "He is considered as a son made *or adopted,* whom a man takes as his own son, the boy being equal in class." *Boudháyana:* "He whom a man adopts, the boy being equal in class, and consenting *to the adoption,* is a son made."

"By a man destitute of a son, must a substitute for the same always be adopted."

From these texts it may be inferred, that a woman may adopt a son for the performance of her exequial rites. It is not laid down by the legal authorities, that the husband's permission is necessary to the adoption of a son made, but such adoption takes place agreeably to established usage. If the woman, after such adoption, be desirous of receding from it, and disclaim the adoption, the filiation of the son made cannot be set aside, for there is no text authorizing the reversal of an adoption.

Q. 2. Is the woman competent to adopt a minor as her *Kurtapootra,* after his having been initiated by the ceremony of *Upanayana,* or investiture with the marks of the class?

And after the ceremony of *Upanayana* has been performed on the boy.

R. 2. The woman is competent to adopt a boy of her own class, whose *Upanayana* ceremony has been performed, with his parents' permission, as her *Kurta* or *Kritimapootra.* In the case of adopting a son in the *Kritima* form, the consent of both the parties is necessary, and, the boy adopted not being independent of his parents, their sanction is required. This opinion is consonant to the

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doctrines of the learned *Váchespatimisra* and others, whose works are current in Mithila.

Zillah Purnea,
August 4th, 1809.

CASE XVII.

Q. 1. There were three brothers (landed proprietors) who jointly possessed an ancestral immoveable estate, and one of them, having no male issue, adopted the son of one of his brothers as his *Kurtapootra,* or son made; in this case, is such adoption good and valid?

A son of a brother may be taken as a *Kritrima* son.

R. 1. One of the three brothers abovementioned being destitute of male issue, and having adopted the son of one of his brothers as his *Kritrimapootra,* or son made, (commonly called *Kurtapootra,*) such adoption is legal. *Atri* says: "By a man destitute of a son," &c.

Q. 2. When the childless brother adopted the son of his brother as his *Kurtapootra,* the boy was the only issue of his parents. In this case, is it allowable that an only son can be adopted by his uncle as his *Kurtapootra*?

Even though he be an only son.

R. 2. Under the circumstances stated, the adoption is legal, by reason of its having been made by the uncle. The text of *Vyasa:* "Accordingly, *Bhairava* at one time cohabited with *Urvasi,* a celestial nymph, and procreated on her a son, named *Suvesa. Vetala* also affiliated him as his son: and in consequence, by means of this son, both attained salvation."

Zillah Tirhoot,
June 22nd, 1824.

CASE XVIII.

Q. A *Sudra,* with the intention of making him his adopted son, took a boy of four years old from his brother, and

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supported him, and performed tho ceremony of his marriage under his own (the adopting father's) name. Subsequently to this, the adopting father had three sons by his lawful wife. Now, supposing the prescribed ceremony for the adoption not to have been performed by the individual in question at the time when he took the boy, in this case, is the adoption complete, so as to entitle the adopted son to inherit the property left by the adopting father, or otherwise?

An adoption is not valid without the observance of certain prescribed forms.

R. It appears in this case, that the *Sudra* did, with the intention of adopting a son, take a boy of four years old from his brother, and supported him; that he performed for him the ceremony of marriage under his own name, and shortly after had three sons by lawful wedlock; and that the prescribed ceremony for adoption was not performed by him at the time of his taking the boy for the purpose of adoption. Here, according to law, the affiliation of the boy cannot be considered as complete, nor is he entitled to the property of the person who took him fcr adoption. This opinion is consonant to the doctrines cited in the *Dattacamimángsá*, *Dattacachandricá*, *Vivádachintámani*, and other authorities.

Authorities.

"The same author propounds a special rule, should the due form for adoption not be observed: "He who adopts a son, without observing the rules ordained, should make him a participator of the rites of marriage, not a sharer of the wealth." The meaning is: the marriage only, of one adopted, without the form for adoption, is to be performed; no wealth is to be bestowed on him: on the contrary, in such case, the wife and the rest even succeed to the estate: for, without observance of form, his filial relation is not produced. Therefore the filial relation of these five sons proceeds from adoption only, with observance of the form of either; not otherwise. Of gift, acceptance, a burnt sacri-

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fice, and so forth, should either be wanting, the filial relation even fails."—The *Dattacamimángsá.*

"In case no form as propounded should be observed, it will be declared that the adopted son is entitled to assets, sufficient for his marriage. And as a text recites, "Let the father initiate his own sons," the initiatory rites even, of the adopted, which are yet to be completed, subsequent to adoption, are to be performed by the adopter; and thus the practice of all the ancients even, in respect to the adoption of a son, unlimited to any particular time, is upheld. For the construction suggested (by us, of the supposed extract from the *Purános*) is self-evident. Accordingly, an author declares, the non-succession to a share, of one adopted without observance of rule: "Him existing, a son being created, and a son given existing, one being adopted informally; that estate is his only, who is justly master of the father's wealth."—*Menu.* "He who adopts a son, without observing the rules ordained, should make him the participator of the rites of marriage, not a sharer of the wealth."—The *Dattacachandricá.* "The boy who was adopted without the form prescribed by law, is a semblance of a son, and is not entitled to participate his wealth."—The *Vivádachintámani.**

Calcutta Court of Appeal,
April 20th, 1810.

CASE XIX.

Q. A person, having a son, left directions with his wife, while afflicted with disease, to adopt a son, and died. Subsequently to his death, the widow applied to the court for

* But the exact observance of any particular ceremonies is not necessary. It is sufficient that certain of the forms prescribed for adoption are gone through, with a view to prove unequivocally the intention of the adopter.

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permission to make an adoption. In this case, can the widow be permitted to adopt a boy, the son of her husband being alive at the time?

R. Although the husband left directions with his wife to adopt a son, yet she cannot make an adoption while a son of her husband is living; for it is prohibited to a wife to adopt a boy while a son is living.*

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* The incompetency of one having male issue is signified by the term "only" in this passage. "It would follow that the adoption of a son, by one whose son had died, notwithstanding the existence of a grandson, were without reason. It therefore results, that one *only* destitute of a grandson, and great-grandson, may adopt." Mr. Sutherland, in his Synopsis, commenting on this passage of the *Dattacachandricá*, observes: "It is necessary that the person proceeding to adopt, should be destitute of male issue capable of performing those rites. By the term issue, the son's son and grandson are included. It may be inferred, that if such male issue, although existing, were disqualified by any legal impediment, (such as loss of caste,) from performing the rites in question, the affiliation of a son might legally take place."

This is unquestionably an accurate exposition of the law of adoption. The author of the *Vivádabhangárnava*, however, observes, that "the adoption of a son given, although a son of the body be living, being thus valid, he shall have a third part of his share, in the same manner with a son given, subsequently to whose adoption a son of the body was born;" and that *Sri Dharaswámi*, in his gloss on a verse of the *Sri Bhagavata*, ("To *Ruchi*, O king! with the consent of *Setampa*, he gave *Acuti*, imposing on her the duty of an appointed daughter, although she had brothers living,") cites a text of law on the benefit arising from a multitude of sons, to explain the motive for desiring many children when a subsidiary son is adopted, even though a principal one be living: "Many sons are to be desired, that some one of them may travel to Gaya." It is written also in the *Mahabhárata* and other works, that "*Pándu*, having other male issue, accepted of *Bhima*, *Arjuna*, and other sons of his wife." And the author of the *Dattacacowmudi* impugns the doctrine laid down in the *Dattacamimángsá*, and maintains that it is absurd; contending, that if the

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CASE XX.

Q. A man of the first class, while afflicted with leprosy, adopted a son. In this case, is the adoption good and valid?

R. A person afflicted with leprosy is incompetent to adopt a son; for he bears the impurity till *death*; consequently the adoption must be considered as void.* A leper cannot adopt.

CASE XXI.

Q. A person having been afflicted with leprosy, or the like disease, performs the expiation (*Prayaschitta*) ordained in the law for it, and adopts a boy as his son. In this case, is the adoption good and legal, or otherwise?

R. The person afflicted with leprosy or the like disease, after his performance of the prescribed penance, becomes Unless he have performed the prescribed expiation.

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authority of *Menu*, *Viswamitra*, *Pándu*, and others be not considered to justify any practice, it is vain to seek for any other guide. In the same work, however, the following condition is declared: "A man, though possessed of màle issue, may adopt another son, *with the sanction of such issue.*"

It may, on the whole, be safely concluded, that whatever may have been the law or the practice in former ages, the simultaneous adoption of two sons, or the affiliation of one by a person who has a son (either his own issue, or adopted,) living, is now illegal, according to the concurrent testimony of the most approved authorities.

* It is not distinctly stated in this case whether the leper performed the prescribed expiation. Certainly the opinion is correct, provided the leper have not performed expiation; but if performed, the adoption is legal, for the impurity of the leper is removed after penance performed. See the following case.

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purified, and is competent to perform *Parvanu*, or double rites and ceremonies, as declared in the *Veda*; therefore the adoption made by the person so purified is good and legal.*

* The opinion is correct, but the law officer by whom it was delivered has omitted to support it by any authority. The following passage from the Digest of *Jagannátha* may serve to supply the omission. "*Raghunandana* holds, that expiation for a man afflicted with elephantiasis, or other similar disease, is ordained for the purpose of enabling him to perform acts of religion ordained in the *Veda*. By parity of reasoning he becomes competent to inherit property, as well as to perform religious ceremonies."

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CHAPTER VII.

Cases of Minority.

CASE I.

Q. A person died possessed of some real and personal property, partly ancestral and partly acquired, leaving a widow under age. In this case, is his father-in-law (the father of his widow), or his grandfather's brother, (whether he lived with the deceased in union or was separated from him), entitled to manage the estate?

R. The management of the estate of the infant widow first rests with her husband's relation, that is, his grandfather's brother, but not with her own father, while such relation exists: in default of the husband's relations, her father becomes her guardian; as is laid down in the text of *Náreda* quoted in the *Dáyabhága:* "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *Sapinda.*"

The management of an estate which has devolved on a minor widow rests with her husband's relations, and with her own relations only in their default.

Zillah Hooghly,
July 8th, 1815.

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CASE II.

Q. A minor orphan has an elder adult brother and two sisters, who are also adult and married. In this case, which of the individuals above specified is, according to law, considered to be the guardian of the minor, as far as concerns the disposal of him in marriage?

Order of relations entitled to dispose of a minor in marriage.

R. The elder brother is alone competent to dispose of the minor in marriage, because it is laid down in the *Mitácshará*, that in the first instance, the father is to perform the initiatory ceremony, such as the marriage of his daughter; in default of him, the grandfather; on failure of the grandfather, the brother, the uncle and his son (next in order); and that on failure of all the persons above enumerated, the mother has the right of disposing of her in marriage. Therefore the right of disposing of the boy in marriage in this case rests solely with his elder brother. His sisters and their husbands have no right to interfere.

Zillah Allahabad, January 10th, 1821.

CASE III.

Q. In the case of a childless widow who is a minor, and whose father and husband's sister's son are both living, which of the individuals in question is entitled to the management of her property?

The father cannot act as guardian to a minor widow, while her husband's sister's son is living.

R. Of the individuals above specified, that is, the widow's father and her husband's sister's son, the latter is her proper guardian in respect of her maintenance, and in the disposal of the property and care of herself; as on her death, he is the successor to the property. This opinion is conformable to the *Dáyabhága*, *Dáyacramasangraha*, *Dáyatatwa*, and other authorities.

Zillah Jungle Mehals, July 2nd, 1822.

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CASE IV.

Q. A landed proprietor died, leaving two minor sons. The mother and paternal uncle of the minors are living. In this case, does the guardianship of the minors' person and estate rest with their mother, or with their paternal uncle?

R. The guardianship of the infants in respect of their person and property, rests with their mother; but if the mother sell or otherwise alienate their property, excepting always a case of necessity, as if food and raiment be absolutely requisite, she should be divested of the management of the estate, and it should be confided to their uncle, supposing him to be competent and honest.

The mother is entitled to the guardianship of her minor children, in preference to their uncles.

Zillah 24-Pergunnahs,
May 10th, 1810.

CASE V.

Q. A person died, leaving a widow and son. The widow, during the lifetime of her son, brings an action against an individual for some of her husband's immoveable estate. In this case, should the action by her, according to law, be held to be admissible, or not?

R. Where the son of the deceased proprietor is living, the suit instituted by his widow claiming his property cannot be admitted unless the son be a minor, that is, unless he be under sixteen years old, in which case the action by her on his behalf should be held to be admissible, she acting the part of his guardian.

A widow having a son may sue for her husband's property, if her son be a minor.

Moorshedabad Court of Appeal,
February 15th, 1814.

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CHAPTER VIII.

Of Gift.

CASE I.

Q. 1. A person assigns his whole property, or a part of it, by a written instrument to another, mentioning in the instrument, that during his and his wife's lifetime, they should retain the property assigned in their own possession, and that after their death, he (the assignee) having performed their exequial rites, should enjoy it; but some time afterwards he gives a part of the property so assigned to another person, and delivers the gift into the latter donee's possession. Under these circumstances, has the last gift validity, or will it be annulled on the strength of the former one? **Property having been assigned to a Brahmin for spiritual purposes, cannot legally be given away without the assignee's consent.**

R. 1. Supposing the person to have assigned the property in favour of a *Brahmin* for performing religious ceremonies, as the worship of idols, solemnization of obsequies, and the like, and the assignee should perform the required conditions, the latter gift cannot be considered good and valid; but if he have bestowed it in the presence of the former assignee, and the latter donee have enjoyed it without molestation, then the last gift is irrevocable.

Q. 2. If the assignor, during the time he retained the property in his hand, transferred a part of it to another person by deed of gift, and put him (the latter donee) into possession of the gift, and again dispossessed him therefrom,

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in this case, can the latter donee bring an action against the donor for the gift in virtue of the deed?

An action for dispossession will lie by a donee against the donor.

R. 2. Under the circumstances stated, the latter donee is authorized to sue the donor to obtain possession of the gift, and the donor is bound to satisfy his claim.

Q. 3. The former assignee, on the death of the assignor, having performed the acts required in the deed of assignment, claims the property occupied by the latter donee; in this case, is the assignee entitled to such property?

And a donee in actual possession is not accountable to a previous assignee.

R. 3. Supposing the assignor to have bestowed immoveable or other property which he had in his own possession on another person, and to have put the donee into possesion of it, then, on the death of the assignor, the assignee cannot legally sue the latter donee for the property. Should the assignee have fulfilled the injunctions prescribed in the deed, he is entitled to the assignor's whole property, excepting that part which was given to the latter donee.

A gift cannot be retained in the hands of the donor.

Q. 4. A person having made a gift of his real and personal property to another, executed a deed to that effect. In this case, is he (the donor) competent to retain the gift in his own possession for the period of fifteen or twenty years?

R. 4. The donor is incompetent to keep the gift in his own possession. This is a received maxim.

Calcutta Court of Appeal,
March 3rd, 1803.

Govindram Misra *v.* Kishorelaul Sookul.

CASE II.

Q. A certain farmer had a family by his two wives, that is to say, by the first wife two sons, A and B, and by the

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second two sons, C and D, and a daughter, E. His son A having separated himself from him, lived apart, and left the family house. His (the father's) eldest wife died before he contracted a second marriage, and his three sons, B, C and D, and his second wife, lived with him as an united family until his death. Subsequently to his death, his three sons (who lived with him jointly) held the farm, and lived together as an undivided family. After some time, however, being unable to discharge the rent due from the farm, they resigned it, separated, and quitted their dwelling-house. After such separation they never re-united. C and D lived again in their father's house, and C alone obtained a portion of his father's farm. Some time after, B returned, and resided in a room of the house. C and D died, leaving neither child nor widow. Subsequently to their death, their mother got possession of the farm, and discharged the rents due. She then executed a deed of gift of the whole farm in favour of her daughter E, and her daughter's son, for their support and for her own exequial rites, and died. Now B claims the property given by his step-mother. Under these circumstances, is the claimant entitled to inherit it, or is the gift legal?

A mother is not competent to make a gift to her daughter of a farm which she had inherited from her son, and on her death it will go to her sons' unassociated half brother.

R. If the donor enjoyed the farm by right of inheritance as heir to her son C, in this case, she was not competent to give the whole farm to her daughter and daughter's son, without the sanction of her step-son B; consequently the farm would, on her death, devolve on the claimant (B). Should the donor, however, have obtained a transfer of the farm in her own name, and procured it to be registered as heirs in the books of the proprietor, and thus have obtained a new title, under these circumstances she was authorized to make a gift of it, and the gift is legal. Therefore the donor's daughter and her son derive a clear title by virtue of the gift, and B has no concern with it.

Zillah Midnapore.

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CASE III.

Q. A landed proprietor had two sons, the eldest of whom died, leaving two sons. Subsequently he (the proprietor) disposed of his entire ancestral estate, consisting of moveable and immoveable property, by a deed of gift in favour of his second son. In this case, is the gift legal or otherwise?

An ancestral landed estate cannot be given to one son, to the exclusion of the sons of another son.

R. He is incompetent to make a gift of the immoveable estate which devolved on him from his forefathers to his second son, without the consent of his eldest son's sons, and the deed of gift is null and void. He is entitled to give jewels and other moveables, though inherited from the grandfather. This is conformable to the *Vivádaratnácara, Mitácshará,* and other authorities.

Authorities.

Yájnyawalcya:—" The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels."

" The father has no power to make an unequal partition, or to make a gift of the ancestral property. This is the doctrine of the *Vivádaratnácara.*"

" They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support: no gift or sale should, therefore, be made."

Yájnyawalcya:—" The father is master of the gems, pearls, and corals, and of all other moveable property: but neither the father nor the grandfather is so of the whole immoveable estate."

Zillah Bhagulpore,
April 7th, 1819.

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CASE IV.

Q. 1. A childless widow had obtained her husband's estate, consisting of land and other property, by right of inheritance. Is she competent to give or sell the property, while there are her husband's other heirs living ; and if she make any alienation, is it legal and valid ?

R. 1. The widow destitute of male issue may give a part of her husband's property of both descriptions, moveable and immoveable, for the completion of her husband's exequial rites ; and when she is in want of subsistence for herself, she may sell such portion as may provide her with maintenance : excepting under these circumstances, any alienation by her, whether by gift, sale, or otherwise, must be considered null and void.

A widow may alienate a portion of her late husband's property for his spiritual welfare, or for her own subsistence.

Q. 2. Is the widow, without the sanction of her daughter's son, entitled to sell a small portion of the property ? and supposing her to have actually made such sale, should it be upheld ?

R. 2. If the daughter's son supply her with maintenance, she cannot alienate without his consent, and if she had actually sold the property, the sale is null ; but in a case where the daughter's son declines to support her, she may sell such portion as may be necessary to her maintenance, without his consent, and the sale should be considered legal and valid.

But not for her own subsistence, if the next heir agree to support her.

The authorities for this opinion are laid down in the *Dáyabhága :* "Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property, or, if still unable, she may sell or otherwise alienate it : for the same reason is equally applicable. Let her give to the pa-

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ternal uncles and other relatives of her husband, presents in proportion to the wealth, at her husband's funeral rites."

Zillah Rajshaye.

CASE V.

Q. If a person make a gift of joint property in a proportion exceeding his legal share, in this case, is the deed of gift illegal ? or will the donee receive the share to which the donor was entitled ?

The gift of joint property, to the extent of the donor's share, is valid (in Bengal).

R. Supposing the donor to have disposed of property appertaining to the joint stock to a greater extent than his own share by a deed of gift, that deed does not become illegal and void ; but the donee is entitled to so much as may be found to be the donor's property in the undivided estate. This is consonant to the *Dáyabhága, Dáyatatwa, Vivádarnavasetu,* and other authorities.*

Zillah Jungle Mehals,
May 26th, 1826.

CASE VI.

Q. The maternal grandfather of a person made a gift of some lands and houses to his grandson's wife, who possessed the gift for some time ; and she, while suffering under the disease of which she died, made a gift of the same property to her daughter's son. Her son, having his uterine sister (the plaintiff), another sister's son (the defendant), and a brother of the half blood, gave away the same property. In this case, which of the gifts is legal and binding ?

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* The law officer by whom the above opinion was delivered has omitted to cite the texts of the works above alluded to ; but his exposition is, according to the law of Bengal, correct, as may be seen by the remark in a case of sale. See Case No. 1 and 16.

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R. The gift made by the woman, of the property which she received from her husband's maternal grandfather, is legal, because the property given is her peculiar property, which by law is termed *Soudayica,* or gift from affectionate kindred; and the gift by her son cannot be considered as valid and legal while she lives, because he has no right of proprietorship over it. This opinion is conformable to the *Dáyabhága, Dáyatatwa Vivádabhangárnava,* and other authorities.

The immoveable property given by a man to his grandson's wife is her peculiar property, over which she has absolute dominion.

Cátyáyana:—"What a woman, either after marriage or before it, either in the mansion of her husband or of her father, receives from her lord or her parents, is called a gift from affectionate kindred; and such a gift, having by them been presented through kindness, that the women possessing it may live well, is declared by law to be their absolute property. The absolute exclusive dominion of women over such a gift is perpetually celebrated; and they have power to sell or give it away, as they please, even though it consist of lands and houses."

The following is the interpretation of *Chandeswara,* cited in the *Vivádabhangárnava:* "In the mansion of her husband," the words are so connected, "from her brother or her parents;" that is merely illustrative: hence, what is received by a woman, either after marriage or before it, in the mansion of her husband, or in the house of her father, from her mother, from her father, or from *other persons,* is *called* a gift from affectionate kindred." *Cátyáyana:* "Neither the husband, nor the son, nor the father, nor the brother, have power to use or to aliene the legal property of a woman."

Zillah Nuddea,
July 26th, 1820.

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CASE VII.

Q. There were two brothers of the whole blood, who had some ancestral rent-free lands. The elder had an only daughter, but no son, and the younger had two sons. The elder disposed of his daughter in marriage, and either gave a part of the landed estate for his daughter's maintenance, or the daughter, on the death of her father, acquired it by right of succession. The mode of its coming into her possession does not clearly appear. Under these circumstances, is she competent to make a gift of such property to a stranger, without the consent of her paternal uncle's sons?

Landed property which a daughter obtains by a gift is hers absolutely; not so that which she acquires by inheritance.

R. If one of the brothers, having contracted his only daughter in marriage, gave a certain quantity of land out of his ancestral landed estate for her support, and the daughter took possession by right of such donation, in this case, she is competent to give it away to a stranger without the sanction of her father's brother's two sons, as that property is termed the gift of affectionate kindred, over which her independency is recognized. If, on the other hand, the property became hers by succession, she had no power to give it without her father's nephew's consent. This is consonant to the authorities prevalent in Bengal.

Authorities.

The texts of *Cátyáyana,* laid down in the *Dáyabhága, Dáyacramasangraha,* and other tracts:—"That which is received by a married woman or a maiden, in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. The independence of women who have received such gifts is recognized in regard to that property; for it was given by their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kin-

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dred is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immoveables."—The following is a passage of the *Dáyabhága:* "Let her enjoy with moderation the property until her death. After her, let the heirs take it."*

"The word "wife" is employed with a general import: and it implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance."

Zillah Beerbhoom.

CASE VIII.

Q. A man having two minor sons, assigned his property, moveable and immoveable, to his wife by a deed of gift; and now the two sons, being of full age and disposing mind, consent to the gift. Subsequently to the gift, the father contracted a second marriage, and the second wife brought forth a son, who claims the whole personal and real property of his father. In this case, is the gift which the father made previously to contracting a second marriage to be considered good and legal?

Personal property given by a husband to his wife on the occasion of contracting a second marriage, is hers absolutely; not so real property, over which the husband's right endures, notwithstanding the gift.

R. Property presented by a husband, while his two minor sons were living, to his wife, on his espousing a second wife, is denominated a woman's property, and the gift by the husband is complete and binding; but that alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control. The wife has no power to give or otherwise alienate the immoveable property which she received from her husband: hence, though such property be hers, it does not constitute a woman's peculiar property, because she has not independ-

* The first hemistich is not here cited.

ent power over it. Under these circumstances, the wife has a right only to enjoy her husband's gift of the real estate during her life. On the death of the senior wife, her issue alone are entitled to take the moveable property which she received from her husband, because that was her peculiar property. The right of the husband endures over the immoveable estate which he gave to his wife; and on the death of the husband, all his sons by either wife are entitled to inherit it.

"To a woman, whose husband marries a second wife, let him give an equal sum, as a compensation for the supersession." "Or presented to her on her husband's marriage to another wife, (as also any other separate acquisition,) is denominated a woman's property."

"What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property."

"The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred), is always subject to her husband's dominion. The rest is pronounced to be the woman's property."

"When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate."

The text quoted are those of *Yájnyawalcya*, *Náreda*, *Cátyáyana*, *Menu*, and *Vrihaspati*.

Zillah Purnea.

CASE IX.

Q. A Brahmin, being in possession of some moveable property consisting of cash, jewels, gold, silver, and other

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effects, died, leaving a widow and a daughter. The widow bestowed all her husband's property of the above description on her daughter's husband. In this case, was the property a fit subject to be disposed of by the widow, and will it go to the donee in virtue of the gift?

R. In default only of the widow, the daughter can inherit; consequently the gift made by the widow to her daughter's husband is good, and the donee is entitled to receive the property in virtue of the disposition in his favour.

A gift of personal property inherited by a widow to her daughter's husband, is good, though the daughter be living.

Authorities.

The text of *Vydsa,* cited in the *Ddyabhdga:*—"What is presented to the husband of a daughter, goes to the woman, whether her husband live or die; and, after her death, descends to her offspring."

City Dacca,
May 29th, 1818.

CASE X.

Q. A Hindu woman, about three or four hours previously to her death, and while she was in a state of extreme weakness, made a gift of her estate, consisting of lands and other property, to a stranger. In this case, is the gift complete and binding?

R. If there be neither issue nor any other heir of the woman, and the property given be not her husband's property, and if when she made the donation she was in the full possession of her mental faculties, the gift is legal and good.*

A gift by a woman of her own property to a stranger is good, if she have no heirs.

City Dacca,
February 24th, 1813.

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* See remark on Case 39.

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CASE XI.

Q. A *Byragee,* or religious mendicant, executed a deed of gift in favour of a person of his own order, by which he assigned over to him his entire property, moveable and immoveable, stipulating in the deed, that on his (the donor's) death, the donee should exercise proprietary right over the property given. The donee died before the donor, who continued in possession of the property during his lifetime, and some time afterwards died. Now the donee's pupil, who is by law considered as his heir, claims the property assigned. In this case, is such pupil entitled to the property in virtue of the deed drawn out in favour of his preceptor, or otherwise?

A gift conditioned to take effect after the death of the donor, does not go to the heir of the donee, if the latter died before the former, unless expressly stipulated.

R. Supposing the donor to have assigned his property, moveable and immoveable, to the mendicant (the donee) in this form, "that you will derive the right of ownership over my property after my death," and the donee to have died previously to the death of the donor, the donee's property had not accrued over the things given; and if there was no particular provision in the deed that the donee's heir should take, in case he died before the donor, the donee's pupil has no legal claim to such property.

Zillah Jungle Mehals,
March 29th, 1819.

CASE XII.

Q. 1. What are the circumstances which render a gift null and void?

Circumstances under which a gift is invalidated.

R. 1. If a gift is made by a person under the influence of lust or anger, or having no title or ownership, or being grievously disordered or disturbed in mind, or intoxicated

or during madness, or in pain, through mistake, or in jest, under impulse of fear, or afflicted with grief, or the like, such gift is considered null and void.

Authorities.

Cátyáyana:—"What has been given by men under impulse of lust, or anger, or by such as are not their own masters, or by one diseased, or deprived of virility, or inebriated, or of unsound mind, or through mistake, or in jest, may be taken back."*

Q. 2. If a person, while afflicted by a sickness from which he died, made a gift of his property, being however at the time in full possession of his mental faculties, in this case, is the gift legal and valid?

A deathbed gift is valid.

R. 2. Notwithstanding the fact that the gift was made during a mortal illness, if the donor, at the time of his making the donation, was of sound mind, this gift is legal and valid.†

Q. 3. How long does the minority of a female continue?

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* There are other circumstances which operate to render gifts void, as the following:

What has been given by a minor, an idiot, a slave, or other person not his own master, or a decrepit old man, or one disabled, or an out-caste, must be considered as ungiven. So must anything given as a bribe, through any fraudulent practice, in consideration of work unperformed, or in excessive joy, in sport, to a bad man mistaken for a good one, or for any illegal act. The authorities for this opinion are laid down in the Digest, vol. ii, treating of void gifts.

† But see note to Case 39.

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Minority extends to the end of fifteen years

R. 3. The minority of a female continues until she has attained fifteen complete years of age.

Zillah Dinagepore,
March 26th, 1814.

CASE XIII.

Q. Is a woman competent to make a gift to her son of her father's estate, consisting of lands and other property, which devolved on her by inheritance? Supposing her father's property to be in a state of joint tenancy with his coparcener, can she dispose of the property to the extent of her father's interest?

The gift by a coparcener of her share of the joint estate is valid, according to the law of Bengal.

R. If there be neither daughter nor daughter's son of her father, the woman is competent to give the property which she inherited from her parents to her son; and if given, the gift must be considered good and valid, even though the property given be joint and undivided. This opinion is conformable to the *Dáyabhága* and *Dáyatatwa.*

Authorities.

Dácsha :—"Presents given to a mother, a father, a spiritual teacher, a friend, a moral man, a benefactor, an indigent or unprotected person, and a learned man, are productive of benefit."

Náreda :—"If they severally give or sell their own *undivided* shares, they may do what they please with their property of all sorts; for, surely, they have dominion over their own."

Zillah Nuddea,
June 7th, 1817.

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CASE XIV.

Q. A person purchased some real property with the produce of his ancestral lands, or with his hereditary annual allowance in money. In this case, is he, having sons and sons' sons, competent to give the whole or a part of such property, without their consent, to his daughter and sister's son for their subsistence, or to sell it to them?

R. If the individual above alluded to purchased some landed property with the produce of lands descended to him from his ancestors, or with his annual pecuniary allowance, and give or sell a part or the whole of such estate (without the consent of his sons and son's sons) to his daughter and sister's son, he is competent to make such alienation, because the property given was purchased with the produce of the patrimonial estate, which does not constitute patrimony; and there is no prohibition recorded against gift by a father of the whole or a part of such property, as his family does not thereby suffer for maintenance, and he is independent with regard to such property. This opinion is consonant to the *Dáyabháaga,* as current in Bengal.

The gift of part or the whole of landed property purchased with the produce of an ancestral estate is good and valid.

Authorities.

Since here also it is said "the whole," this prohibition forbids the gift or other alienation of the whole, because immoveables and similar possessions are means of supporting the family. The prohibition is not against a donation or other transfer of a small part, not incompatible with the support of the family.

Zillah Beerbhoom.

CASE XV.

Q. 1. A family, consisting of three brothers, having come to a division of their ancestral moveable and immoveable

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property, separated themselves from each other, and enjoyed their respective shares. Under these circumstances, is one of the brothers having a wife, a daughter, a daughter's son, and a childless widow of his son, without their consent, competent to give his landed estate to his two younger brothers? If consent be necessary in this case, whose consent is required?

According to the law of Bengal, a person may dispose of his entire portion of ancestral property, to the exclusion of his wife and daughters.

R. 1. If the associated brothers, having separated themselves from each other, live apart in the enjoyment of their respective shares of the patrimony, and one of them, during the lifetime of his wife, daughter, daughter's son, and son's childless widow, without their consent, give his own share to his two younger brothers, he is competent to do so, because he is master of his own share, and is by no means dependant in respect of it. This opinion is conformable to the *Dáyabhága* and other authorities current in Bengal.

Authorities.

"Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." The above text is of *Náreda,* cited in the *Dáyabhága,* &c.

Q. 2. If it were conditioned in the deed of gift, that the donees should supply the expense attendant on the donor's being carried to the river side, when at the point of death, also the expense attendant on his exequial rites, the maintenance of his son's childless widow, and should discharge all his debts; and if the donee fulfilled some of the conditions, leaving others unperformed; in this case, has the deed of gift validity or otherwise?

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R. 2. Supposing the donor to have conditioned in the deed of gift, that the donees should defray the necessary expenses of his being carried to the river side at the point of death, of his exequial rites, of the subsistence of his son's childless widow, and should also satisfy his debts, and the donees to have fulfilled the whole of the conditions as mentioned in the deed, then the instrument becomes binding; but not so, if the whole of the conditions are not fulfilled, in which case the deed of gift has no validity. In the case of a gift, the donor's will is predominant; and where all the conditions made by him in the deed of gift are not fulfilled by the donees, it is not followed by the creation of their property in the gift, as a conditional gift depends on the performance of its conditions, and when those are fulfilled, it becomes complete.

A conditional gift is rendered null and void by the omission of the donee to perform all the conditions stipulated by the donor.

Authorities.

"For the will of the giver is the cause of property."—*Dáyabhága.* "If the subject pay not revenue, the grant, being conditional, is annulled by the breach of the condition." —*Vivádabhangárnava* and other authorities.

Q. 3. Supposing the donor, during his illness, but in the full enjoyment of his faculties, to have executed the deed of gift; in this case, is it complete and binding?

R. 3. Under the circumstances stated, the deed of gift must be considered good and valid.*

A deed of gift executed on a deathbed is valid.

Authorities.

The following passage is cited in the *Vivádabhangárnava* and other tracts: "What has been given by men agitated with fear, lust, grief, or *the pain of* an incurable disease, &c. must be considered as ungiven."

Zillah Beerbhoom.

* But see note to Case 39.

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CASE XVI.

A person died, leaving no heir down to the widow, and his property devolved on his daughter, who was the mother of male issue. Afterwards the daughter's son died, by which means she became a childless widowed daughter. She subsequently made a gift of her father's property to her childless widowed sister, and died. The latter took possession of the property. In this case, was the childless widowed daughter competent to give, sell, or make other alienation of the entire property, while her father's brother's son was living? and supposing such disposition to have been made, is it legal and binding, or otherwise?

A daughter is not competent to alienate property which had devolved on her from her father to the prejudice of the next heir.

R. Under the circumstances stated, the childless widowed daughter had only a right to the enjoyment of her father's property with moderation. Therefore the disposition by her was illegal. This is conformable to the *Dáyabhága* and other works.

City Dacca,
July 4th, 1816.

CASE XVII.

Q. 1. Is it lawful to make a gift of joint undivided property, whether real or personal, according to the law current in Tirhoot?

According to the law as current in Tirhoot, a gift of joint property is invalid.

R. 1. A gift of joint undivided property, whether real or personal, is not valid, even to the extent of the donor's share; for property cannot be sold or given away until it is defined and ascertained, which cannot be done without a division.

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Authorities.

"Partition *(vibhága)* is the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate."—*Mitácshará.*

Q. 2. Is the *Birt Muhabrahminee,* or profits arising from the levy of sacrificial fees, a fit subject of transfer? and supposing such profits to be enjoyed jointly by several of the class of persons denominated *Maha Brahmins,** is it lawful for any one of the coparceners to transfer his share, either by sale or gift?

R. 2. The profits of the *Birt Mahabrahminee* do not constitute a fit subject of transfer, and no one of the sharers in the joint profits of the *Birt* is at liberty to transfer to another person his own interest therein: even if the profits had been divided, the same prohibition would apply, inasmuch as the sacrificial fees, which constitute the *Birt,* are only fit to be received by the officiating priests, to whom they were offered; and the purpose of the offerings, namely, the spiritual welfare of deceased ancestors, would be defeated by the alienation. And *Birt* profits are unalienable.

Authorities.

"Having assembled eleven *Brahmins,* having invoked the manes of deceased ancestors, let him present to the *Brahmin* occupying the foremost seat, the couch, &c. belonging to the deceased."—*Deva Yugnika,* cited in the *Nirnaya Sindhoo.* "Having sprinkled them with odoriferous perfumes, let him present to the sacrificer his father's wearing

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* Priests who attend at funerals: in some districts they are called *Mahabrahmin;* in others *Mahapatra, Agraháin, Pretiya, Cantaha,* &c. See note to page 61, vol. ii, Colebrooke's translation Digest Hindu Law.

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apparel, his ornaments, his sleeping couch," &c.—*Vrihaspati*, cited in the *Nirnaya Sindhoo.*

Sudder Dewanny Adawlut,
May 14th, 1823.

Nundram and others *v.* Kashee Pandee and others.

CASE XVIII.

Q. A person, previously to contracting a second marriage, executed an agreement in behalf of his eldest wife to the following effect: " You will exercise authority as proprietor over a *Guddee* (religious endowment) at Rudsetta, and I have no concern with it, and my second wife will have the right over the *Guddee* at Bahmun Gurh. If there be no issue (of mine), you will moreover have a ten-anna share of the *Guddee* at Bahmun Gurh, (which he assigned to the second wife,) and my second wife the remaining six-anna share." In this case, is the instrument, according to law, good and binding?

A man may give all his property to his two wives in unequal allotments, provided they each have enough for maintenance, and he have no other heirs.

R. The husband was the master of his own wealth, and has the power to give away his property, provided his family do not suffer on account of maintenance; consequently, if the produce of the six-anna share of the *Guddee* at Bahmun Gurh will suffice for the expenses attendant on his second wife's maintenance, and there be no issue, then the ten-anna share of the *Guddee* at Bahmun Gurh, which he, previously to contracting a second marriage, conditionally assigned by the agreement in favour of his eldest wife, will go to her (the eldest wife), and the agreement is good and binding.

Authorities.

The text of *Náreda,* quoted in the *Dáyabhága*: " Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."

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Vrihut Menu: "The support of persons who should be maintained, is the approved means of attaining heaven; but hell is the man's portion, if they suffer. Therefore let a master of a family carefully maintain them."

City Moorshedabad,
June 11*th*, 1818.

CASE XIX.

Q. A *Sudra,* having no male issue, and having disposed of his eldest daughter in marriage, makes a gift of his whole property, moveable and immoveable, while his maiden daughter and wife are living, to such eldest daughter, and then dies. In this case, is the donee entitled to exercise exclusive proprietary right over the property assigned by virtue of the deed of gift? and if so, is she at liberty to make a gift of a part of the property to her sister, and is such gift legal?

According to the law of Bengal, a gift of the entire property, moveable and immoveable, to a married daughter is legal, even though a wife and maiden daughter are in existence.

R. Supposing the *Sudra* who is destitute of male issue, but having a wife and a maiden daughter, to have given his whole estate, consisting of lands and other property, to his married eldest daughter, the gift must be considered good and legal. The authorities for this opinion are laid down in the *Dáyabhága.* "When there are many persons sprung from one man, who have duties apart, and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."—*Náreda.**

* Though according to the law as current in Bengal, the father is competent to dispose of his whole property, provided there be neither son, nor son's son, nor son's grandson, yet he acts sinfully if he do so while a maiden daughter exists, whose initiatory ceremony (that is, marriage) is unperformed, or if his family suffer for the necessaries

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Should the donee have bestowed a portion of the gift on her unmarried sister, that gift also must be considered complete and binding.

Authorities.

The texts of *Cátyáyana,* cited in the *Dáyabhága:* "That which is received by a married woman or a maiden in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. The independence of women who have received such gifts, is recognized in regard to that property; for it was given by their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale, accordiug to their pleasure, even in the case of immoveables."

From the doctrine quoted, it is clear that the donee was competent to make a gift of the property received from her father to her maiden sister. This is conformable to the *Dáyabhága, Dáyatatwa, Sricrishna Tercálancara,* and other legal authorities.

Zillah Mymunsing,
January 18*th*, 1823.

CASE XX.

Q. A person having a sister (mother of male issue or childless), can he, according to the law as current in Ben-

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of life. It is incumbent on a housekeeper to initiate his children and to support his family, and he who does not perform these duties is culpable, as expressly declared by *Menu:* "Reprehensible is the father who gives not *his daughter in marriage,* at the proper time, and the husband who approaches not *his wife* in due season: reprehensible also is the son who protects not his mother after the death of her lord."

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gal, dispose of his ancestral landed estate by gift to a person paternally related to him? Supposing the proprietor to have died without making any alienation of his property, leaving no male issue, in this case, how will his property be distributed among his sister, sister's son, and his paternal relations?

R. There is no disabling provision in the law against a proprietor's alienation of his patrimonial immoveable property while his sister or sister's son exists; consequently the donor was competent to give his property to his paternal relation, and the gift is good and legal. Supposing the childless proprietor to have died without making any gift, leaving his sister, his sister's son, and his paternal relations; the sister, provided she be a maiden, is entitled to wealth sufficient to defray her nuptial expenses; but with exception to such allotment, she has no claim on her deceased brother's property. If there be no heir of the deceased down to his brother's grandson, the sister's son is entitled to inherit from him, for he confers a benefit on the deceased's ancestors by performing the double rites.

The whole estate may be given away, though there is a sister and sister's son. The sister has no right of inheritance, but her son will inherit in default of heirs down to the brother's grandson.

Authorities.

Nárada:—"Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."

"Though immoveables or *bipeds*,"* &c.

"Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the

* *Dáyabhága*, page 31.

gift or transfer is not null: for a fact cannot be altered by a hundred texts."

The right of a sister is denied by the following text:

"Riches were ordained for sacrifice. Therefore they should be allotted to persons who are concerned with religious duties; and not be assigned to women, to fools, and to people neglectful of holy obligation.*

By the mention of "women," must be understood all females, except the wife, daughter, mother, paternal grandmother, and father's grandmother of a person dying childless.

Dacca Court of Appeal,
June 21*st*, 1823.

CASE XXI.

Q. 1. An unassociated Hindu, before a large assembly of persons, verbally nominated the plaintiff as a fit subject to perform his exequial rites, and to take his entire property. In this case, is the plaintiff, after his death, entitled to succeed him?

A verbal gift property by an unassociated Hindu, on condition that the donee will perform his exequial rites, is good, on the death of the donor.

R. 1. Supposing the deceased to have appointed his relation's son (the plaintiff) to perform his exequial rites, and to have verbally made a gift in his favour; in this case the plaintiff, if he offer up the requisite oblations to the manes of the deceased, is entitled to succeed to his property.

* *Mitácsharà*, page 329.

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Q. 2. If there be the deceased's brothers of the whole blood or other relations living, have they any right to share the inheritance?

R. 2. The brothers and other relations have no right to the succession, because the deceased was master of his one wealth of all sorts.

To the exclusion of the brothers of the donor.

Zillah Sylhet,
June 6th, 1812.

CASE XXII.

Q. A person brought an action, claiming a third part of a certain landed estate, against the purchaser of the land, and his brother who had sold it; and previously to the decision, the complainant assigned his interest in the property in dispute by a deed of gift to his minor nephew, who was the son of the selling brother. In this case, is the deed of gift complete and binding; and in virtue of the same, is the minor donee's guardian authorized to carry on the suit for the estate, as the complainant was to do?

R. If it be proved that the complainant, in the full possession of his intellectual faculties, executed the deed of gift, disposing of his entire interest in the property in dispute, in favour of his minor nephew, and subsequently died, the deed of gift is, according to law, good and valid; and by virtue of such deed the minor donee's guardian, as manager of his affairs, may carry on the suit for the property in question.

A plaintiff may make a gift of the property he is suing for, and the guardian of the donee is thereby empowered to carry on the suit.

Calcutta Court of Appeal,
May 31st, 1821.

Premchand *v.* Ramchander Bhoorja.

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CASE XXIII.

Q. A person died, leaving no male issue, and was succeeded by his maiden daughter, who, subsequently to his death, married, and had a son in lawful wedlock, which son died leaving several sons. Some time after, the daughter of the original proprietor made a gift of her father's whole moveable and immoveable property to one of her son's sons, though there are her husband and other sons of her son living. In this case, is the gift legal?

Property which had devolved on a daughter, cannot by her be given to one son's son, to the exclusion of such grandson's brothers.

R. Under the circumstances above stated, the gift of the whole property made by the daughter, without the sanction of her son's other sons, must be held in law to be null and void.

Calcutta Court of Appeal, June 18th, 1812.

CASE XXIV.

Q. Is a person, having an uterine sister, competent to dispose of his ancestorial landed and other property by gift, in favour of a stranger? and if so, is his sister entitled to get her maintenance out of the property given?

Though his sister be living, a man may give away all his property to a stranger.

R. It is competent to a person to give away his patrimonial property, moveable and immoveable, though his uterine sister be living. If the sister be married, she has no right to have her maintenance out of the gift.

City Chinsurah.

CASE XXV.

Q. Is a *Brahmin*, whose eldest brother, leaving his ancestral and self-acquired property in a joint state with him, had entered into the order of a religious student, and is still living, competent to make a verbal gift of the whole undivided estate to his daughters, or otherwise?

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R. When the eldest brother, having left the order of a housekeeper, entered into that of a religious student, his right to the paternal estate became extinct: therefore the gift of the undivided property made by the younger brother to his daughters is legal and valid.

Retirement from the world is civil death, according to the Hindu law.

Authorities.

The text of *Vasishta,* as laid down in the *Retnácara* and other books of law: "They who have entered into another order, are debarred from shares."

Zillah Burdwan,
January 15*th,* 1817.

CASE XXVI.

Q. 1. Is a landed proprietor at liberty, having a son born in lawful wedlock, to bestow his whole or a portion of his landed estate by gift to his son by a woman of another class, or to a stranger, without the consent of his legitimate son?

R. 1. "Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them *should* not be *made* by him, unless convening all the sons."

Without the consent of his legitimate son, a man cannot alienate any part of his immoveable property.

"By favour of the father, clothes and ornaments are used, but immoveable property may not be consumed, even with the father's indulgence." "All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten; but should a true legitimate son be afterwards born, they have no right of primogeniture. Such among them as are of equal class (with the father), shall have a third part as their allotment: but those of a lower tribe must live dependant on him, supplied with food and raiment." "The legitimate son is the sole heir of his father's

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estate: but, for the sake of pity, he should give a maintenance to the rest."

According to the above quoted texts of *Menu*, *Yájnyawalcya*, *Náreda*, and *Devala*, the father is incompetent to give, sell, mortgage, or make other alienation of his immoveables and bipeds, where a legitimate son is living, without his consent.* The father is competent to make a gift to his illegitimate son sufficient to provide him with food and raiment, though there be a legitimate son alive.

Q. 2. Subsequently to the death of the raja, his widow adopted a son, and put him in possession of all the property left by her husband. Shortly after, she, without the sanction of her adopted son, assigned a portion of the estate, by a deed of gift, to a stranger. In this case, is such gift legal and valid?

A widow having an adopted son cannot without his consent alienate any portion of the estate which belonged to her husband.

R. 2. "Let a childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, take her husband's share, and enjoy it with moderation until her death. She is not entitled to make a gift, mortgage, or sale of it."

"In childhood, must a female be dependant on her father; in youth, on her husband; her lord being dead, on her sons; *if she have no sons, on the near kinsman of her husband*; *if he* left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign: a woman must never seek independence."

"Though immoveables or bipeds," &c.

According to the doctrines of *Cátyáyana* and *Yájnyawalcya*, the widow is incompetent to make a gift, mort-

* It will be observed, that this case was decided according to the law as current in Benares.

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gage, or sale of any property, excepting such as she may have received from her affectionate kindred, without the sanction of her adopted son.

Bareilly Court of Appeal.

CASE XXVII.

Q. The complainant stated in her petition, that her husband's maternal grandfather, having been destitute of male issue, made over his whole ancestral landed estate by a deed of gift to his daughter, being her (the complainant's) mother-in-law, and died. The donee having taken possession of the gift, and enjoyed its produce for a considerable period, transferred it by gift to her son, the complainant's husband, who died, leaving two minor sons. Subsequently to his death, his mother died, on whose death the defendants dispossessed her (the complainant) and her sons from the property. The defendants answered, that the original proprietor died, leaving a widow and two daughters; that subsequently to his death, his widow came into possession of the landed estate; that on her death, her two daughters succeeded, but that the original proprietor had made no gift, as alleged, in favour of his elder daughter; that his second daughter had a son, whose death occurred prior to hers; that his elder daughter had two sons, (one being the complainant's husband,) which two sons died before her; and that, conformably to law, the property enjoyed by the original proprietor should have devolved on her paternal kinsmen. Under these circumstances, should the complainant's allegation be proved, is the gift legal or otherwise? If, on the other hand, the reply be considered proved by the depositions of the witnesses, will the property left by the elder daughter devolve on her son's sons and widow (the complainant), or on her father's kinsmen, the defendants?

R. Should it be proved that the original proprietor gave his entire estate, consisting of lands and other property, to **Landed property acquired by gift from her**

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father may be alienated by a woman, but not that to which she had succeeded by inheritance.

his elder daughter, and that she had bestowed it on her son (the complainant's husband), such gift must be considered legal, the gift by a female of immoveable property received from her father or affectionate kindred being recognized as valid in law. If, on the other hand, the original proprietor did not make the gift to his elder daughter, in this case, she was incompetent to alienate her father's property which had devolved on her by the law of inheritance, and the gift to her son is illegal. Supposing the elder daughter to have died after the death of her son (the complainant's husband), the succession goes to her paternal kindred (the defendants), to the entire exclusion of her son's sons and widow (the complainant).

Authorities.

"The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immoveables."

"To the nearest kinsman, the inheritance next belongs."

Zillah Burdwan,
March 24th, 1821.

CASE XXVIII.

Q. A person, by recourse to law, recovered some of his father's acquired rent-fee landed property which had been formerly lost, while his other brothers were living together with him and his father as an undivided and joint family, and the father verbally gave the property so recovered to the son who had recovered it, and the donee took possession of the same. In this case, is the donation, according to law, valid and good, or otherwise?

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R. Should one of the brothers recover the patrimonial immoveable property which had been formerly lost or seized by strangers while the family was in an undivided state, the other brothers must give a fourth part of the land so recovered to him who retrieved it, in addition to his regular allotment. Here the property recovered was the father's self-acquisition, and the father voluntarily gave it to the recoverer: therefore the gift is legal. This opinion is conformable to the *Dáyatatwa* and other authorities.

According to the law of Bengal, a father may give all his self-acquired landed property to one of his sons.

Zillah Jungle Mehals,
June 19*th*, 1821.

CASE XXIX.

Q. A woman executed a deed of gift, in which she assigned her property, moveable and immoveable, to a person whom she educated and supported, and she (the donor) on the same date, and before the same company in whose presence the deed was executed, obtained an agreement from the donee, purporting, that while the donor lived the donee should support her, and not act contrary to her directions, on failure of which conditions the gift should be held null and void. The donee having got possession of a part of the immoveable property mentioned in the deed, and subsequently a dispute having arisen between the donor and donee, the former wishes to revoke the gift, and to recover possession of the property occupied by the donee. In this case, is the donor competent to recede from her former disposition, or not?

R. It appears in this case, that the woman having received an agreement from a person, purporting that he should support her until her death, and not deviate from her commands, gave to him her own estate, consisting of lands and other property, and that the donee did not fulfil the conditions stipulated. In this case, the donor is entitled

A gift may be taken back, on the donee's violation of the conditions annexed.

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to take back the document from the donee, and to revoke the gift.

Zillah Chittagong, April 5th, 1816.

CASE XXX.

Q. A woman made a gift of her property to her daughter and son-in-law, by a written instrument. In this case, is she (the donor) competent to revoke the gift, or otherwise ?

Resumption of an unqualified gift unlawful.

R. No person is competent to revoke a gift lawfully made, and to resume possession of the property disposed of by the gift.

Zillah Chittagong, January 30th, 1816.

CASE XXXI.

Q. A person having an uterine brother, executes an instrument in favour of his wife, in which he desires that she, on his death, should be allowed to make a gift or sale of his self-acquired property, moveable and immoveable, and dies without issue. In this case, is the widow entitled to dispose of the property mentioned in the deed, by gift or sale ?

A widow in Bengal may, with the recorded permission of her husband, alienate his immoveable self-acquired property, although his brother is living.

R. Supposing the deceased to have left authority with his wife by a written instrument to make a gift or sale of his self-acquisitions, consisting of moveable and immoveable property, while his uterine brother was living, and to have died, leaving no heir down to the great-grandson, the widow, according to her husband's permission, is competent to give or sell the property in question. This is the received opinion.

Calcutta Court of Appeal.

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CASE XXXII.

Q. A person of the *Brahminical* class disposed of his divided immoveable property by gift to his daughter, and then died. The donee remained about thirty-two years in undisturbed possession of the gift, but she was a childless widow. In this case, was she competent to make a gift of such property; or if she give it to her own *Purohit,* or family priest, is the gift complete and binding?

R. The childless widowed daughter has the power of giving the landed property which she received from her father, after her marriage, to a *Brahmin,* and the gift of such description of property made by her to her priest, is considered good and legal. The authorities for this opinion are laid down in the *Dáyabhága* and other legal works.

A woman may dispose of, at her pleasure, landed property acquired by gift from her father.

Authorities.

Cátyáyana:—"That which is received by a married woman or a maiden, in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of donation and of sale, according to their pleasure, even in the case of immoveables. Neither the husband, nor the son, nor the father, nor the brothers, can assume the power over a woman's property to take it, or to bestow it."

Zillah Hooghly,
January 16*th*, 1821.

CASE XXXIII.

Q. A fisherman's widow (there being at the time three sons of her contemporary wife living) made a gift of the whole of her self-acquired estate, consisting of a house and other property, to two *Brahmins,* for the purpose of pro-

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moting her spiritual welfare: and having put the house into the possession of the donees, lived with them in it, and died while a son of her rival wife and his wife were residing in the same house. On her (the donor's) death, her step-son performed her exequial ceremonies, and then died. Now his (the step-son's) widow claims the house. Under these circumstances, is the gift good and valid?

A widow may dispose of, by gift or otherwise, as she pleases, the property earned by her own exertions.

R. Supposing the fisherman's widow to have acquired some wealth by her own personal exertions, and to have purchased the house with such acquisitions, and to have bestowed it on two *Brahmins* for her own spiritual welfare, and to have delivered the gift to them before her death, in that case, her property over it became extinct, and on the extinction of her right the donees' title accrued. The donees' right cannot be lost, even though the donor's rival wife's son and his wife lived in that house. The extinction of their (the donees') property can be occasioned only by their non-acceptance of the gift, or by their disposing of it by sale or other alienation. According to the doctrine of the *Dáyabhága* and other legal authorities, the step-son's widow cannot have any claim to the property, for she has no right over it, and the law admits the validity of a sale and gift made by a woman of the donations of her affectionate kindred and of other peculiar property.

Authorities.

The texts of *Náreda* and other legislators are quoted by the authors of the *Dáyabhága* and other works of law. "The wealth which is earned by mechanical arts, or which is received through affection from any other (but the kindred), is always subject to her husband's dominion. The rest is pronounced to be the woman's property." "The independence of women who have received such gifts is recognized in regard to that property; for it was given by

their kindred to soothe them, and for their maintenance. The power of women over the gifts of their affectionate kindred is ever celebrated."

"In that which she has gained by the exercise of an art, such as painting or spinning, he is entitled to take it, even without the occurrence of any distress."*

Dacca Court of Appeal.

CASE XXXIV

Q. Has a *Byragee*, or religious mendicant, the power of giving his whole property to his concubine, while his son by a female slave is living? and if so, is the donee authorized to make a gift of such property to a stranger? Has the son of the female slave, whom the mendicant expelled from his house, the right of inheritance, so long as his concubine (the donee) lives, or is he excluded?

The concubine of a *Byragee* may dispose of, at her pleasure, property given to her by him, though he have an illegitimate son, who would otherwise have been sole heir.

R. If the religious mendicant, at the time he made the donation to his concubine, was not under the influence of lust, anger, or other passion which has been declared sufficient to invalidate a gift, the gift must be considered legal and valid, because every person is master of his own wealth; but the donor acts sinfully by making a gift of his whole property, while any part of his family exist. The woman, however, neither obtained the property by inheritance, nor received it from her husband. She therefore may give it to a stranger. There subsists no property of the mendi-

* Property personally acquired by a woman does not, strictly speaking, fall under any one of the six descriptions of *Stridhun* or *peculium*, as enumerated by *Yájnyawalcya* or *Jimutavahana*, inasmuch as it is admitted that the husband's dominion extends over the earnings of her industry. See Digest, page 566, vol. iii. In this case, however, the husband was dead.

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cant, after his disposal by gift of his entire estate in her favour; and the son of the female slave has no right to the property during the lifetime of the donee. If the donor, subsequently to the gift, should have acquired any estate, or if any property should have been reserved at the time of the gift, such will, on the death of the donor, according to the customs of religious mendicants, devolve on the son of the female slave. And even should the female slave have been expelled or degraded, her son, being free from natural defect, is entitled to the property earned subsequently to the gift, or reserved at the time thereof. This opinion is conformable to the *Dáyabhága*, *Smritisára*, *Vivádabhangárnava*, *Menu*, *Dáyatatwa*, and other legal authorities.

The text of *Vrihaspati*, cited in the *Dáyabhága*: "At his pleasure, he may give what he himself acquired."

"In the *Smritisára*, the validity of the donation is admitted: " A man's own gift is valid, because he has property, which is the established cause of validity. But it is not admitted that the religious purpose is attained, for he has not observed the commands of the law."—*Vivádabhangárnava.*

Menu:—" The recitation of holy texts, and the sacrifice ordained by the lord of creatures, are used in marriages for the sake of procuring good fortunes to brides; but the first gift, or troth plighted, by the husband is the primary cause and origin of marital dominion."

The passages of *Yájnyawalcya* quoted in the *Dáyatátwa*;—" Even a son begotten by a *Sudra* on a female slave, may take a share by the father's choice; or after the death of the father, the brethren shall allot him half a share.

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Should he have no brother, he shall take the whole, unless there be a daughter's son."

The *Vamana-purána*:—" A man should not neglect the approved customs of districts, the equitable rules of his family, or the *particular* laws of his race."

Zillah Nuddea,
April 9th, 1827.

CASE XXXV.

Q. A person having a wife and two daughters, made a verbal gift in favor of one of them of his whole ancestral landed and other property: in this case, is the gift legal or otherwise?

A man may give his whole property to one daughter, to the exclusion of his wife and another daughter.

R. Under the above circumstances, the gift orally made by the father to one of his daughters, though when he made the gift there were his wife and another daughter living, is legal and valid.*

Zillah Burdwan,
April 14th, 1821.

CASE XXXVI.

Q. 1. A person makes a gift of some immoveable property to his daughter's sons, who are under age, and live under his control. The donor keeps the property given in his own possession. Under these circumstances, should the gift be considered valid and binding, or otherwise?

A gift to a minor is valid, provided on his coming of age he exercise ownership over it.

R. 1. Supposing the donor to have bestowed the estate on the minor sons of his daughter, who are under his care and protection, and that he retained the property in his own possession during the donees' minority, in this case, the gift is legal; but if, on the expiration of the donees'

* This, it should be observed, is a Bengal case.

minority, the donor continued to retain possession of the property, and the donees had not in any manner exercised ownership over it, the gift in such case is not valid or binding.

Q. 2. Supposing the donor abovementioned to have disposed of a small portion of his ancestral landed property also by a gift to his daughter's sons, without the consent of his own sons, is the gift of such property legal, or otherwise?

A man, without the consent of his sons, may give a small portion of his property to his daughter's sons.

R. Though the donor's sons may not have consented to the gift, yet he was authorized to give a small portion of the landed estate which descended to him, to his grandsons in the female line: consequently the gift is good and valid.

Zillah 24-*Pergunnahs,*
January 31*st,* 1810.

CASE XXXVII.

Q. A person of the *Brahminical* class, having separated himself from his brothers, while living apart from them, acquired thirty-one *beegahs* and eleven *cottahs* of rent-free land, and by succession to his son, he became proprietor of sixty-three *beegahs* and seven *cottahs* of the same description of landed property which the son had obtained by gift. Having enjoyed these estates for some time, he died, leaving a widow, who succeeded him; and she, while her husband's brother's sons were living, made a gift of a portion of the landed estate to her own brother. She mentioned in the deed of gift, that the land was bestowed for the spiritual benefit of her late husband. In this case, is the gift legal?

A widow may, for the spiritual benefit of her deceased husband, make a

R. It does not appear from the question what quantity of the land was given; but the gift of a small part only of the estate, for the spiritual welfare of her deceased husband,

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is legal; because, although it is laid down in the *Dáyabhága* and other books of law, that the widow of a deceased man who left no male issue, may only enjoy his property until her death, she is entitled to make a gift of a small part of it for the benefit of her husband, which if she do, the gift should be upheld as legal.

gift of a small portion of his estate, to her own relation.

Zillah Dinagepore,
April 15*th*, 1820.

CASE XXXVIII.

Q. A *Brahmin,* who had some rent-free lands and other property, died, leaving three sons, A, B and C, and a daughter, D. The sons jointly enjoyed their father's property for some time, and the eldest of them (A) died, leaving a son and a daughter. The son of A took possession of his father's share, and died shortly afterwards, and on his death it devolved on his sister's son. The second son B died, leaving only a widow as his heir; and the younger son C, having supported B's widow, took possession of two shares; that is, one for himself, and the other for his deceased brother B. In this case, are C and B's widow competent, having assigned a small portion of their shares of the property in favour of their spiritual teacher, family priest, and of D's son, to give the remainder to the grandson of A? And if they have given their shares by a written instrument, is the deed of gift legal? and if not, who is entitled to succession?

R. Under the circumstances stated, the younger son C, and B's widow, were competent, having assigned a small portion of their respective shares to their spiritual teacher, family priest, and D's son, to give the remainder to A's grandson in the female line by a deed of gift, which deed must be considered legal. But if those persons had

Property may be given to a brother's daughter's son, to the exclusion of a sister's son; though, according to the law of inheritance, the latter

would exclude the former.

died without making such gift, then the property would have devolved on the sister's son (D's son.)

Calcutta Court of Appeal.

Nundram *v.* Ramtunoo Mookhorjea.

CASE XXXIX.

Q. A Hindu, having an uterine sister's son living, made over his entire estate, consisting of moveable and immoveable property, which he had acquired by dint of his own industry, by gift to a woman whom he kept as a concubine. At the time when the deed of gift was executed, he was afflicted by illness, which terminated in his death two days afterwards. In this case, is the gift legal; or supposing it to be void and illegal, will his entire property devolve on his sister's son?

The gift of a man's own acquisition is valid, though made on his deathbed, if he was of sound disposing mind at the time.

R. Supposing the person alluded to in the question to have made over his self-acquired real and personal estate by gift to his concubine while his uterine sister's son was living, and presuming him to have been, at the time when the deed was executed, of sound disposing mind, in that case the alienation is good and valid; otherwise it has no validity, and the sister's son will inherit.*

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* This opinion, and the one which preceded it to the like effect, must be received with some degree of qualification. It has been laid down as a general principle by Mr. Colebrooke, in his treatise on Obligations and Contracts, book iv, §§ 645, that "by the Hindu law, a gift or gratuitous contract, made by a person afflicted with an incurable distemper, is void. His equanimity being disturbed, he does not possess the self-control requisite to a valid act and legal disposal of his property." It follows, that to uphold a gift made on a deathbed, there should be the clearest proof of sound disposing mind, to repel any presumption which might exist to the contrary.

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Menu says: "He may give it away at his pleasure, or he may defray his expenses with such wealth."*

Náreda : "Though *generally* his own master, what a man does while disturbed from his natural state of *mind*, the wise have declared not done, because he is not *then* his own master."

Patna Court of Appeal.

CASE XL.

Q. A person, previously to his death, gave directions to his two wives that they should each accept a son in adoption. Subsequently to his death, his elder wife did not accept a son, and the two widows equally divided his estate. The elder widow made a gift of her whole share to a stranger, and died. Afterwards the younger widow received a boy in adoption. In this case, will the share of the elder widow go to the donee, or will it devolve on the adopted son of the younger widow?

A widow, having received instructions from her husband to adopt a son, and without doing so, making a gift to a stranger of the property which had devolved on her at her husband's death, such gift is invalid.

R. The son adopted by the younger widow with her husband's sanction, is entitled to the share of the elder widow, who infringed her husband's directions by omitting to make an adoption. The gift of the share which she received by participation with her rival wife is not legal, and the donee cannot take the property conveyed; because the adoption of a son is the only means in this case of preserving the libations of food and oblations of water at the funeral repast; and when she, without doing such benefit to her deceased husband, made the gift, she deserves to be ranked among those widows who are incompetent to succession. Consequently the gift by her is null and void.

Zillah Dinagepore,
August 31*st*, 1813.

* Not of *Menu*, but *Vrihaspati.*

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CASE XLI.

Q. A certain *Rajpoot* made a gift of his entire property, real and personal, to his son, and put him in possession thereof; he himself going to reside in another place, where he contracted a debt. In this case, is it fit that the property given should be publicly sold for the satisfaction of the debt, while the debtor is living?

The gift by a man of his whole property is unlawful and inoperative, as against a creditor.

R. The following opinion is consonant to the *Mitácsharà*, *Menu*, and other law authorities. The text of *Náreda*, cited in the *Mitácsharà*: "In civil affairs, the law of gift is four-fold; what may, or may not, be given, and what is, or is not, a valid gift."

"In distress for *the maintenance of* the family, *property* may be given away, except a wife or a son: but not the whole of a man's estate, if he have issue living: nor what he has promised to another." It is laid down by *Menu*, that only such property should be given away as remains after the food and clothing of the family have been provided for.

"*Menu* declared, that a father and mother, in their old age, a virtuous wife, and an infant son, must be maintained, even though doing, a hundred times, that which ought not to be done."

He again forbids the gift of the whole property by the text: "The ample support of those who are entitled to maintenance, is rewarded with *bliss in* heaven; but hell is the portion of that man, whose *family* is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care."

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The texts of *Dacsha,* cited in the *Viramitrodáya:* "Joint property, deposits for use, bailments in the form called *nyasa,* pledges, a wife, her property, deposits for delivery, bailments *in general,* and the whole of a man's estate, if he have issue alive, are things which the learned have declared unalienable, even in times of distress: the man who gives them away is a fool, and must expiate *the sin* by penance."

The prohibition as to gifts is declared by *Yájnyawalcya* to be made, lest, by the alienation, the family may suffer for want of maintenance. *Cátyáyana* declares what may and may not be given: "Except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, *whether fixed* or *moveable,* otherwise it may not be given."

Menu:—"When the judge discovers a fraudulent pledge or sale, a fraudulent gift and acceptance, or in whatever other case he detects fraud, let him annul the whole transaction."

From the preceding authorities, it appears that the gift of the whole property was unlawful, as it involves a fraud upon the creditor; consequently the property fraudulently given must be sold for the liquidation of the debt. The gift of the whole property, even for religious observances, is prohibited; but an inquiry should be made, as to whether the debtor has any other property to satisfy the creditor's claim.

Zillah Furruckabad,
December 13*th,* 1818.

CASE XLII.

Q. A person, in the year 1207, F. S. executed a deed of gift of his landed property in favour of an individual,

whom he adopted as a *Kritrimapootra*, or son made, and the deed was duly attested with the seal of the *Kazee;* but a transfer of names was not effected in the Collector's records. It does not clearly appear that the donee ever took possession of the property given. The donee, in the year 1215, F. S. died, leaving a widow in a state of pregnancy, who subsequently to his death brought forth a son. Shortly after the donee's death, the donor called upon the same *Kazee*, without giving any notice to his adopted son's widow, and having destroyed the deed of gift formerly drawn out by him, executed a deed of sale of a four-anna share of the same property to a third party, and a deed of gift of the remaining twelve-anna share to the donee's son, and got them duly attested with the *Kazee's* seal and signature. Shortly after, another individual instituted a suit against the donor, claiming the lands as his ancestral property. The donor confirmed his claim, and put him into possession of the property in question. Upon this, the widow of the original donee brought an action against the purchaser and the plaintiff above alluded to, with a view to recover possession of the whole sixteen-anna share of the property formerly conveyed by gift to her husband. It is satisfactorily proved, that the estate in question was exclusively the property of the donor, and that his confession of the claim of the party who sued him was merely the result of collusion to deprive others. In this case, are the widow of the original donee and her son competent to claim the whole property, in virtue of the deed of gift executed in favour of the deceased, or otherwise?

A gift once made cannot be resumed at the pleasure of the donor.

R. The word gift denotes the annihilation of the donor's property, and the creation of that of the donee. The property once given away cannot be resumed, and any subsequent alienation of such property is not consistent with the law.

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Menu :—"Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say, 'I give:' these three are, by good men, done once for all, *and irrevocably.*"

Secondly, as the donor adopted the donee by the *Kritrima* form of adoption, the latter is to be considered his son; for he is enumerated in the series comprising twelve descriptions of sons: consequently the donee was entitled to the property at all events, and his widow and son are moreover entitled to claim it in virtue of the gift, it having belonged exclusively to the donor.

City Patna,
August 20*th*, 1814.

Dyal Singh *v.* Hoolea.

CASE XLIII.

Q. 1. A person having two daughters, a brother's son, and a son who was an outcaste, verbally conferred his entire estate, consisting of moveable and immoveable property, on one of his daughters. In this case, is the gift good and legal?

A gift by a father of his entire property to one daughter, is legal, though he may have another daughter, and brother's son.

R. Supposing that the person alluded to, through paternal affection, verbally alienated his whole landed and other property to one of his daughters, while his other daughter, a nephew, and an outcaste son were living, the alienation is legal, and the persons abovenamed have no right to the property, as is laid down in a text of *Ydjnyawalcya*: "They who know the law of gifts declare, that things once delivered as the price of goods sold, as wages, for the pleasure *of hearing poets, musicians, or the like,* from natural affection, as an acknowledgment to a benefactor, as a nuptial gift to a bride *or her family,* and through

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regard, cannot be resumed."* This is conformable to the *Mitácshará* and other authorities.

Q. 2. Supposing the gift to be illegal, and the outcaste son dead, and that there are two daughters and a brother's son of the donor living, which of these survivors is entitled to the inheritance?

The other daughter, if unmarried, is entitled to have the expenses of her nuptials defrayed.

R. 2. Whatever property is given to a daughter, the gift is legal; for it ensures the production of benefits, as *Vyása* says: "A gift to a daughter is productive of an eternal enjoyment of benefit, and also to a brother."

The other survivors have no right of succession; and if the other daughter be a maiden, she is only entitled to such portion of the property as may suffice for the necessary expenses of her nuptial ceremony.

Zillah Agra,
March 9th, 1813.

CASE XLIV.

Q. A person, on the death of his son and wife, having reserved some landed property which descended to him from his forefathers, for the maintenance of his sisters and their sons, disposed of the remaining portion, by a deed of gift in favour of his spiritual teacher or his son, the deed being excuted with the consent, and in the presence of his sisters, but not of their sons. In this case, is the gift legal?

The gift of a paternal estate is valid without the consent of sisters' sons.

R. Under the circumstances stated, the gift must be considered good and valid.

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* This is not the text of *Yájnyawalcya*, but of *Náreda*. See Dig. vol. ii, p. 291.

According to the Hindu law, a man who has neither a son, nor a son's son, nor a great-grandson, is competent to give away his ancestral real estate, even though there be his other relations living: in this case, the sisters' or their sons' consent is superfluous.

Zillah Burdwan,
July 25th, 1823.

CASE XLV.

Q. A person died, leaving two sons, who having taken possession of their patrimonial estate, lived together as an undivided family. The elder brother, being destitute of children, adopted a son of his kinsman of the sixth degree in the paternal line, and died. Subsequently to his death, the adopted son lived with his uncle, being the brother of his adopting father, as an united and joint family. The second brother had no male issue, and made a gift of his property to his daughter's son. Now the adopted scn claims the property left by the two brothers by right of inheritance; and the donee, being the second brother's grandson in the female line, claims also in virtue of the gift. Under these circumstances, to which of the claimants should the property go? If it go to both the claimants, to what proportion is each of them respectively entitled?

A man cannot make a gift of his property to a daughter's son, to the exclusion of the adopted son of an unseparated brother.

R. Should a person be succeeded by his two sons, the elder of whom, having no issue, adopts the son of a remote kinsman, and the second, on failure of a male child, executes a deed of gift, in which he assigns his whole property to his daughter's son, while his deceased brother's adopted son is living, and the estate and family are undivided and joint; in this case, the gift is illegal. When a man, who separated from his *coheirs,* and not reunited with them, dies, leaving no male issue, his widow takes his whole estate; in default of her, his daughters inherit. The term "daughters" means both the daughter and daughter's son,

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as *Yájnyawalcya* expresses it: "The wife and the daughters, &c." A son may take his adopting father's estate, and also the adopted son of an unseparated brother is entitled to inherit from his uncle.

Menu says: "Not brothers, nor parents, but sons, *if living*, or *their male issue*, are heirs to the deceased."

Zillah Sarun,
September 21*st*, 1810.

CASE XLVI.

Q. There were three brothers who held some landed property in coparcenary, one of whom died childless, leaving a widow, who succeeded to the share of her husband. Subsequently, the surviving brothers sold their entire estate, including the share to which the deceased was entitled, to a stranger. The widow applied to a court of justice for her husband's portion: a decree was passed in her favour, and she was put in possession of the property claimed. She then, notwithstanding that her husband's two brothers' sons and grandsons in the male line were alive, made a gift of the whole of her husband's property, which she recovered by litigation, to one of her husband's brothers' grandsons. In this case, has the gift validity or otherwise?

The fact of a widow's having recovered her husband's share by litigation, gives her no additional power over it.

R. Under the circumstances above stated, the widow was incompetent to give away her husband's whole property to one of his brothers' grandsons while there were his other nephews and their sons existing, and the gift must be considered illegal, as expressly declared by the following sages. *Cátyáyana*: "Let her enjoy with moderation the property until her death. After her, let the heirs take it." "Let the widow, preserving unsullied the bed of her lord, take his share; but she may not seek independence while she lives, to give, pledge, or sell it."

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"Even in this case, if a partition should have been made, the widow is not entitled to the immoveable property."

CASE XLVII.

Q. A person having an adult son, without that son's consent, disposed of by gift to a stranger a part of his maternal grandfather's dependant landed estate, the *zemindar* or proprietor of which had dispossessed him, conditioning in the deed, that if he (the donee) could recover possession of the property, he might exercise proprietary right over it, and he (the donor) would have no concern with it. The donee having recovered the estate, in this case, is the deed of gift binding and legal? and if so, is the donor's son's property divested in virtue of the gift; or on the death of the donor, will his son acquire the right of ownership?

A person having a son may make a gift of his maternal grandfather's landed property which had been usurped, on condition of the donee's recovering it.

R. Under the circumstances stated, the donor was competent to give his maternal grandfather's immoveable property, which devolved on him by succession, to a stranger, and the right is complete and binding. There is no law that the daughter's son's son shall inherit; consequently the donor's son has no right to annul the gift. This opinion is conformable to the *Dáyabhága, Vivádachintamani, Dáyarahásya,* and other works of law.

Authorities.

The text of *Vrihaspati,* cited in the *Vivádachintámani:* "Of houses and of land acquired by any of the seven modes of acquisition, whatever is given away should be delivered, distinguishing *land* as *it was* left by the father, or gained by the occupier himself. At his pleasure he may give what himself acquired. A pledge must be disposed of by the law of pledges, *or subject to redemption;*

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but of property acquired by marriage, or inherited from ancestors, not every gift subsists."

It is laid down in the *Dáyabhága,* that "Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null: for a fact cannot be altered by a hundred texts."

The passage of *Sancha,* quoted in the *Dáyaruhásya:* "Land inherited in regular succession, but which had been formerly lost, and which a single (heir) shall recover solely by his own labour, the rest may divide according to their due allotments, having first given him a fourth part."

CASE XLVIII.

Q. A man dying, and leaving some landed property, a son begotten by him on a concubine got possession of that property, and died leaving no children. He was succeeded by a widow. Was she (the widow of the latter deceased person) competent to make a gift, sale, or other alienation of the property, while the daughter's son, or another concubine of the original proprietor, exists? If she should have made either of such dispositions, is it good and binding, or otherwise?

The son of a *Sudra* by a concubine or female slave, is entitled to inherit property, but his widow is incompetent to aliene to the prejudice of other heirs.

R. It is not particularly mentioned to what class the original proprietor belonged. If he was a *Sudra,* that is, of the fourth class, and the daughter whose son survives was begotten by him on a concubine, the widow of the son of his other concubine may enjoy the whole estate, whether consisting of real or personal property, during her lifetime, and she may also give or sell a small portion of it for the completion of her husband's funeral rites, or for his spiritual benefit, as well as for her own maintenance; but [illegible]

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circumstances excepted, she is incompetent to dispose of the property inherited from her husband, and the gift of such property made by her must be considered void.

Authorities.

Thus in the *Mahabhárata,* in the Chapter entitled *Dana-dharma,* it is said: "For women, the heritage of their husband is pronounced applicable to use. Let not women on any account make waste of their husbands' wealth." "Even use should not be by wearing delicate apparel and similar luxuries: but, since a widow benefits her husband by the preservation of her person, the use of the property sufficient for that purpose is authorized. In like manner, (since the benefit of the husband is to be consulted,) even a gift or other alienation is permitted for the completion of her husband's funeral rites. Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property; or, if still unable, she may sell or otherwise aliene it: for the same reason is equally applicable." This opinion is declared in the *Dáyabhága.*

Cátyáyana :—"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

"Abiding with her venerable protector, that is, with her father-in-law or other of her husband's family, let her enjoy her husband's estate during her life, and not, as with her separate property, make a gift, mortgage, or sale of it, at her pleasure."

Nárada :—"When the husband is deceased, his kin are the guardians of his childless widow: in the disposal of the property and care of herself, as well as in her maintenance, they have full power."

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Ydjnyawalcya:—"Even a son, begotten by a *Sudra* on a female slave, may take a share by the choice of the father; but if the father be dead, the brethren should make him partaker of half a share."

By the term, "a son begotten by a *Sudra* on a female slave," must be understood daughters, daughters' sons, and other heirs. This opinion is conformable to the *Dáyabhága, Dáyatatwa, Vivádachintámani, Mitácshará, Menu*, and other legal authorities.*

City Dacca,
May 1*st*, 1816.

CASE XLIX.

Q. 1. A Hindu *zemindar* dies childless, leaving a widow; who one day previous to her death, in full possession of her faculties, executed a Will, or conditional deed of gift (duly signed and attested,) of all the property, real and personal, with the profits accruing therefrom, to which she had succeeded on the death of her husband, together with the profits which had accrued therefrom, and all the property acquired by herself, in favour of a stranger. In this case, what property will pass by such Will, or conditional deed of gift?

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* In the case also of Bindrabun Chund Rai *versus* Bishunchund Rai, where the respondent claimed to retain possession of certain lands on the plea of gift from a Hindu widow by whom they had been taken on her husband's death, on a division among the heirs, the court of Sudder Dewanny Adawlut held that the plea was not proved, and that at all events the gift would have been invalid without the consent of the heirs.—*Sudder Dewanny Adawlut Reports*, vol. iv, page 143. Aud in another case, (page 117 of the same volume,) it was determined, that the widow of a Hindu, who died without children, had the power of making a gift of a portion of her late husband's property for his spiritual benefit; but such not appearing to the court to have been the object of the gift in the case in question, the claim of the donee was disallowed.

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R. 1. Although the instrument in question may have been duly signed and attested, and executed by the widow while in the full possession of her faculties, still she was not competent, without the consent of her husband's heirs, and those on whom she was dependant, to make a conditional gift, stipulating for the possession of the donee after her death, nor was she at liberty to make a will affecting the landed and other property left by her husband, into the possession of which she came on his death, nor affecting the profits of it, nor affecting her own acquisitions made by means of the landed property to which she had succeeded, or by means of its profits. As, therefore, the gift or disposition by Will of all three descriptions of property abovenamed, (viz., landed property devolved on her from her husband, personal property, and her acquisitions made by means of the inherited estate, and its profits,) is illegal, no part of that property goes to the donee: but whatever the widow may have acquired by means, other than those of the inherited property and its profits, is her own *Stridhun,* or peculiar property, and she is at liberty, (except in the case of immoveable property given to her by her husband,) to dispose of such *Stridhun* by will or gift, as she pleases; and, therefore, the *Stridhun* of the widow, (except immoveable property given to her by her husband,) can pass to the stranger under the will or conditional deed of gift. This opinion is given in conformity to the *Dáyabhága, Sricrishna Tarcálancára's* commentary on the *Dáyabhága, Dáyatatwa, Dáyaruhásya, Cátyáyana, Menu,* and other authorities current in Orissa.

A widow cannot alienate, by gift or will, property devolved on her from her husband, nor her own acquisitions made by means of such property.

But she may dispose of her own peculiar property as she pleases, except such part of it as consists of *immoveable* property given to her by her *husband.*

Authorities.

1st. "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death: after her, let the heirs take it."—Text of *Cátyáyana,* cited in the *Dáyabhága, Dáyatatwa,* and other authorities.

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2d. "Land passes by six formalities: by consent of townsmen, of kinsmen, of neighbours, and of heirs, and by gift of gold, and of water."—Text of unknown origin, cited in the *Dáyatatwa,* and other authorities.

3d. "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power."—Text of *Náreda,* cited in the *Dáyabhága,* and other authorities.

4th. "But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *Sapinda.*"—Text of *Náreda,* cited in the *Dáyabhága* and other authorities.

5th. "In the disposal of property, by gift or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons."—*Jimutavahana* in the *Dáyabhága.*

6th. "As the dependance of women in making gifts is on their husband's relations, it is evident that she may make gifts to them with their consent."—Commentary of *Sricrishna Tarcálancára.*

7th. "For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husbands' wealth." Here the term waste indicates that they are not at liberty to dispose of the property as they please, by gift, sale, or other means."—Text of the *Mahabhárata,* cited in the *Dáyaruhásya.*

8th. "A gift, pledge, or sale of lands, houses, or slaves, by a dependant person, is invalid or inefficient."—*Cátyáyana.*

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9th. "The wealth which is earned by mechanical arts or which is received through affection from any other (but the kindred), is always subject to her husband's dominion. The rest is pronounced to be the woman's property. That which is received by a married woman, or by a maiden, in the house of her husband, or of her father, from her husband, or from her parents, is termed the gift of affectionate kindred. The power of women over the gifts of their affectionate kindred is ever celebrated, both in respect of dominion and of sale, according to their pleasure, even in the case of immovables."—Texts of *Cátyáyana,* cited in the *Dáyabhága, Dáyacramasangraha,* and other authorities.

10th. "What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, or may give it away, excepting immoveable property."—Text of *Náreda,* cited in the *Dáyabhága.*

11th. "But in the case of immoveables bestowed on her by her husband, a woman has no power of alienation by gift or the like."—*Jimutavahana* in the *Dáyabhága.*

12th. Gift consists in the effect of raising another's property.

Q. 2. In the event of such disposition being declared illegal and void, to whom will the widow's *Stridhun* go, supposing there to be descendants of her father or grandfather living? Will it go to them, or to the nephews or other heirs of her husband? An answer is required to be delivered to this question according to the law of Orissa.

R. 2. The instrument in question having been thus proved to be illegal and void, supposing there to be no descendants of the father or grandfather of the woman living, and she have no unmarried daughter, or affianced daughter,

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nor married daughter, nor son, nor daughter's son, nor son's son, nor son's grandson, nor stepson, nor stepson's son, nor stepson's grandson, nor husband, nor mother, nor father, nor husband's younger brother, nor son of her husband's younger brother, nor son of her husband's elder brother, nor son of her sister, nor son of her husband's sister, the *Stridhun* will go to her brothers, or her brothers' sons, with reference to their propinquity, and not to the nephew or other heirs of her husband. This opinion is delivered in conformity to the *Dáyabhága, Dáyacramasangraha, Dáyatatwa,* and other authorites current in Orissa.

Stridhun will be inherited by the woman's brother or brother's son, to the exclusion of her husband's heirs.

Authorities.

1st. "The sister's fee belongs to the uterine brothers. After them it goes to the mother, and next to the father."

2d. "The mother's sister, the maternal uncle, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers. If they leave no issue of their bodies, nor son (of a rival wife), nor daughter's son, nor son of those persons, the sister's son, and the rest, shall take their property."—Text of *Vrihaspati*, cited in the *Dáyabhága, Dáyacramasangraha, Dáyatatwa,* and other authorities.

Sudder Dewanny Adawlut,
July 12*th*, 1815.

Kundrup Singh, appellant *v.* Mohunlol Khan, respondent.

CASE L.

Q. A proprietor of a ten-anna share of a landed estate had a son, who died before him, leaving a widow and three daughters. The said proprietor having brought the appellant from a certain place, gave him in marriage to one of his three grand-daughters, and presented him with his entire share of the property as a *Yautuca,* gift (property

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given at a marriage), by a deed; and it is also proved that the appellant took possession of the property so given, and sold a two-anna share of it with the consent of his wife, which sale was admitted as good and valid by the decisions of the *zillah* and provincial courts. In this case, has the widow of the son of the donor a right to sell any portion of the remaining eight-anna share?

A man may give his entire property to the husband of one of the daughters of his deceased son as a *Yautuca*, or nuptial present, to the exclusion of his son's widow and other daughters.

R. It appears from the evidence adduced in this case, that the landed proprietor in question separated his portion of the estate from that of his coparceners, and caused it to be registered in his son's name; and that having brought the appellant from a distant place, he gave him in marriage to one of his three grand-daughters, presenting him with his entire estate as a *Yautuca*, or nuptial gift, while his own wife and his son's widow and two unmarried daughters were living; and that he died, leaving directions with the appellant to support his and his son's widows. Under these circumstances, the property which is specified in the deed of gift, according to law, being the appellant's estate, the deceased son's widow has no right over it, and cannot sell it. It also appears that the deed of gift was attested by three witnesses; consequently the donee's proprietary right to the estate specified in the deed being so established, the son's widow has no right to it, and therefore her claim is inadmissible.

Authorities.

Menu:—"After the (death of) father and mother, the brethren, being assembled, must divide equally the paternal estate: for they have not power over it while their parents live."

Vishnu:—"When a father separates his son from himself, his will regulates the division of his own acquired wealth."

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Devala:—"For sons have not ownership while the father is alive and free from defect."

"But wealth received on account of marriage is considered to be that which has been accepted with a wife."

Dacca Court of Appeal,
May 1820. }

Jugunnath Das *v.* Mudunmohun Ghose and others.

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CHAPTER IX.

Of Slavery.

CASE I.

Q. A person living in service, was supposed by the inhabitants of the place to be the slave of the individual whom he served. In this case, is he to be treated as a slave, from the fact of such notoriety? and if so, is the master competent to dispose of him by sale?

Slaves are of fifteen descriptions. Enumeration of them.

R. According to law, slaves are of fifteen descriptions; but it is not distinctly mentioned in the question to what sort of slavery the individual alluded to belonged. Of the fifteen descriptions of slaves, five are the following: one born of *a female slave* in the house of *her master (Grihajatá),* one bought *(Krita,)* one received *by donation (Lubdha,)* one inherited from *ancestors (Kramagutá),* and one self-sold *(Atmabikryá)*; and the issue of these five slaves become the property of their master: the person whom they serve is competent to sell them, and they cannot be emancipated. The remaining ten are these: one maintained in famine, an apostate from religious mendicity, one *who has* offered *himself* in this form, "I am thine," one relieved from great debt, one pledged by a former master, one made captive in war, *a slave* won in a stake, one maintained in consideration of service, a slave for the sake of his bride, and a slave for a stipulated time: these ten can be emanci-

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pated without the consent of their master. The passage of *Náreda*, as laid down in the *Vivádachintámani*: "Of those *slaves*, the first four *(one born in the house, one bought, one received, and one inherited)* are not of right released from slavery: unless they be *emancipated* by the indulgence of their masters, their servitude is hereditary. That low man who, being independent, sells himself, is the vilest of slaves; he also cannot be released from slavery."

City Dacca,
May 26th, 1824.

CASE II.

Q. A female slave being the property of two individuals, one of them disposed of her in marriage to the slave of another person, and ordered her to go to her husband's house, where she is still living. The other proprietor brought an action in a court of justice, claiming her. In this case, does the plaintiff's right consist over half her person, or is he entitled to half the price of her person?

One of two owners of a female slave giving her away in marriage, the other still retains his right to half her labour, or half her value.

R. Of two proprietors of the slave girl, if one disposed of her in marriage without the consent of his co-parcener, the person who did not consent is entitled to half the servitude of the slave girl, but not to half her person; and if he wish to get half the value of her person, he may recover it. This opinion is received by the learned.

Zillah Chittagong,
March 13th, 1818.

CASE III.

Q. A slave being the property of three individuals, one of them, with his own free will, emancipated him from servitude, to the extent of his legal share. In this case, is the slave released from his obligations to the other two proprietors; if not, how are the two remaining masters to claim their right of servitude?

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R. Supposing one of the three proprietors to have emancipated the slave from servitude to the extent of his legal share, and the other two not to have done so, the right of the person who discharged him is divested by emancipation, but the property of the others cannot be destroyed by that transaction. The slave must serve those individuals who have not emancipated him, according to their shares in him.

The emancipation of a slave by one of three masters, does not render him free with respect to the other two.

Zillah Mymunsingh,
July 15*th*, 1813.

CASE IV.

Q. A female slave, having been emancipated from servitude, suffered much for the necessaries of life, and sold herself with her two daughters, one of them five, and the other seven years of age, with her late master's consent. In this case, is the sale of the daughters of such tender years available in law or not? Have the daughters an option, on attaining the age of majority, to set aside the sale of their persons?

R. If the slave, after having been emancipated, sold herself and her two minor daughters with her late master's sanction, the sale is legal, and the daughters, on attaining the age of majority, have no power to nullify the contract. This is the received opinion.

Children sold as slaves, are not entitled to their freedom on coming of age.

Zillah Chittagong,
July 19*th*, 1819.

CASE V.

Q. A person procures a contract of marriage to be entered into between his slave and the daughter of a free person, and subsequently sells his slave's wife to another. In this case, has the master of the slave derived any right of proprietorship over the person of the slave's wife, by reason

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of her being subject to his slave; and is the sale of such woman allowable by law?

A free woman, by marrying a slave, becomes the slave of her husband's master.

R. A free woman becoming the wife of a slave, becomes a slave to her husband's master, who has full power to alienate her by sale, and the sale is good and valid.

Zillah Chittagong,
August 20th, 1819.

CASE VI.

Q. Four brothers purchased a female slave, who subsequently brought forth a son and a daughter. Of the four brothers, one sold his property over the slaves to the other three, while the male slave was only eleven years old, and afterwards he (the slave) married a free woman, and then died. Of the three proprietors, two left no heir at their death, and one is survived by a son. In this case, is he (the brother's son) competent to sell the widow of the slave, or otherwise?

And on the death of her husband, may be sold by his master.

R. If there be no nearer heir of the deceased brothers, the brother's son is competent to sell the widow of the son of the female slave, because the nephew is by law entitled to succession. If he be not the next heir of the deceased proprietors, he can only sell his right over the slave's widow. The sale of slaves is admitted by the usage of the country, and by law.

Authorities.

Cátyáyana says:—"A free woman, or one who is not a slave of the *same master*, (*for the word* adasi *may bear either sense,*) becoming the bride of the slave, also becomes a slave to *her husband's owner;* for her husband is her lord, and that lord is subject to a master."

Dacca Court of Appeal.

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CASE VII.

Q. A slave having left his master's house, resided in another place, and supported himself by his own labour for the period of ten or twelve years, during which time his master neither sent for him nor required his attendance, though it was known to him where the slave was living. In this case, does it follow that the master has relinquished his right of property; or, on the other hand, is a sale of the slave made by the master under such circumstances valid and binding?

The property in a slave is lost by neglecting to claim him for more than twelve years.

R. Of the fifteen sorts of slaves, five only, that is to say, one born of a female slave in the house of her master, one received by donation, one self-sold, one inherited, and one bought, cannot be released until their master emancipates them. It appears in this case that the slave, for ten or twelve years, with the knowledge of his master, lived in another place, and supported himself by his own labour, and contracted marriage by means of funds acquired by his personal exertion; and that the master neither made any endeavours to bring the slave back to his service, nor defrayed the expenses incident to his maintenance. In this case, a forfeiture of his right of ownership over the slave necessarily follows; because not objecting his silent neglect, which constitutes the loss of all property (after the period above alluded to), with exception to that which is immoveable: and the sale is illegal.*

CASE VIII.

Q. An inhabitant of Sylhet wishes to sell his female slave and her family, consisting of four sons and a little

* The proprietary right to moveable property lapses after a period of ten years, provided there was wilful neglect on the part of the owner for that period; but not if his non-interference was unavoidable.

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girl, for a fixed sum, to another person. The slaves make an application to the court, stating that they are willing to serve their own master, but that the latter, from enmity, has come to an understanding with the intended purchaser to have the family removed from the place of their nativity, and the individuals sold at separate places.

Can the slaves, according to the Hindu law as current in Sylhet, object to such a sale?

May they, in case their master is determined to part with them, select another person, whom they prefer to be their purchaser? Or may they purchase their own liberty, if they can raise the sum demanded?

Four sorts of slaves cannot effect their own emancipation.

R. From the purport of the above question, the slaves alluded to in it are understood to be of that description, among the fifteen sorts of slaves specified in the *shasters*, which is termed *Grihajatá,* or born in the house. Five of these descriptions of slaves, one born in the house, one bought, one received, one inherited, and the slave self-sold, are not released from slavery, unless they be emancipated by the indulgence of their masters. Now if the owner, being inclined to sell his slave, wish to alienate his right of service by selling for a sum fixed by himself, any of those five sorts of slaves (the son born in the house, &c.) in right of his ownership and free-will, he can sell the slaves, although willing to serve him.

But they should not be consigned to misery by sale.

In the above case, if taking the price fixed by their master from the purchaser chosen by him would occasion great misery to the slaves, then the master's alienation of his slave born in the house, and the rest, by taking his fixed price for the slave from a purchaser chosen by the slave, or from any other purchaser, should be maintained under the adaptation to circumstances prescribed by the shasters;

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for the master incurs no loss by receiving his fixed price for the slave, even from the purchaser chosen by the slave, or from any other purchaser.

But still the slave born in the house, and the others, can never be released from slavery by paying the price set upon them by their master from their own property ; for the master's right of authority extends to the property of his slaves.

This *vyavastha* is in accordance with the *Vivádabhangárnava, Dáyacramasangraha, Dáyabhága* and other works current in the district of Sylhet.

Authorities.

1st. The follwing text of *Náreda*, cited in the *Vivádabhangárnava* and *Dáyacramasangraha:* "One born in the house, one bought, one received by donation, one inherited from ancestors, one maintained in a famine, one pledged by a former master, one relieved from great debt, one made captive in war, a slave won in a stake, one who has offered himself in this form, 'I am thine,' an apostate from religious mendicity, a slave for a stipulated time, one maintained in consideration of service, a slave for the sake of his bride, and one self-sold, are fifteen slaves declared by the law."

2d. This interpretation is in the *Dáyacramasangraha.*

"One born in the house," is, one born of a slave girl."

3d. The following passage in the *Dãyacramasangraha.*

"Among these slaves, the first four (one born in the house, &c.) and the slaves self-sold, cannot of right be released from slavery, unless they are emancipated by the indulgence of their masters."

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4th. The following text of *Vrihaspati*, quoted in the *Vyavaháratatwa* and other tracts.

"Judgment is not to be formed, relying on the *shaster* alone; for a failure of justice is produced when an inquiry is not adapted to circumstances."

5th. This text of *Menu*, cited in the *Vivádabhangárnava*, *Dáyabhága*, *Dáyatatwa*, and other works.

"Three persons, a wife, a son, and a slave, are declared by the law to have in general no wealth exclusively their own: the wealth which they earn is regularly acquired for the man to whom they belong."*

Zillah Sylhet,
June 13*th*, 1825.

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* This case was referred for the consideration and orders of the superior court by the magistrate of Sylhet, accompanied by the following statement: "A person possesses a slave, and sells him to another person for a sum of money. The slave admits that he is the slave of the seller, but presents a petition to the magistrate, saying that he is unwilling to remain as the property of the purchaser, and he prays that the magistrate will allow him to buy his liberty from the latter at the same sum the purchaser was to give, and thereby be absolved from slavery. Is the magistrate at liberty to act accordingly? The purchaser objects to the slave being able to effect this, and insists on the purchase being valid, and on his right of retaining the slave. It appears but just, that as the original seller's object in disposing of the slave was money, if the slave has it in his power to liberate himself from bondage, the magistrate should have a right to interfere, and thereby prevent the slave from being in the possession of a person to whom he objects." To this reference, after taking the opinion of their law officers as above, the court replied to the following effect:—"From the *vyavastha* of their law officers, the court are of opinion, that the slaves whom it is proposed to sell to one whose intentions they suspect and dread, may be allowed to select a purchaser with whom they are satisfied, and that in this their proprietors must acquiesce. [illegible]

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CASE IX.

Q. 1. What descriptions of slaves are authorized by the Hindu Law?

R. 1. There are fifteen descriptions of slaves: as follows,

1st. *Grihajatá,* one born of a female slave in the house of her master. **Birth.**

2nd. *Kreeta,* one purchased from his former owner for a sum of money. **Purchase.**

3rd. *Lubdha,* one received in donation. **Donation.**

4th. *Dayadopaguta,* one acquired by inheritance. **Inheritance.**

5th. *Anakulabhritta,* one maintained in a time of scarcity or famine. **Maintenance during famine.**

6th. *Ahita,* one received in pledge. **Pledge.**

7th. *Rinadasa,* a distressed debtor voluntarily engaging to serve his creditor for a stipulated period. **Debt.**

8th. *Joodhaprapta,* one made captive in war. **Conquest.**

9th. *Punajita,* one won in a stake or gaming wager. **Won in a stake.**

10th. *Oopagata,* one offering himself as a slave, without any compensation, and saying, "I am thine." **Voluntary surrender.**

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answer, however, does not go the length of stating that slaves are competent to purchase their freedom from their masters against the consent of the latter. This doctrine corresponds with what has been laid down by Puffendorf on the same subject, (book vi, chap. 3, §§ 4 :) "Nor doth it appear that he can transmit them to another master without their consent, they being really in the capacity of perpetual mercenaries or hirelings, working for the advantage of him that employs them, whilst continuing in that state, but not at his disposal when obliged to leave it."

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Desertion from a religious order.

11th. *Prubrujeabusita,* an apostate from religious mendicity, who deviates from the rules of the order he may have voluntarily entered, and who thereby becomes the slave of the king.

Servitude for a stipulated period.

12th. *Kritakala,* one offering himself in servitude for a stipulated period.

Ditto for the sake of maintenance.

13th. *Bhuktadasa,* one offering himself in servitude for the sake of maintenance.

Ditto for the sake of a bride.

14th. *Burrubabhritta,* one becoming a slave for the sake of marrying a slave girl.

Voluntary sale.

15th. *Atma Vikryee,* one who sells himself for a pecuniary consideration.

The above fifteen sorts of slaves have been enumerated by *Náreda* and *Menu* in the *Mitácshará, Ratnácara, Vivádachintámani, Calpataru, Smritisára, Vivádatandava, Smriti Sumoochuya, Madhaviya,* and other legal authorities.

Q. 2. What legal powers are the owners of slaves allowed to exercise upon the persons of their slaves, and particularly of their female slaves?

Duties to be performed by slaves, and penalties for omitting them.

R. 2. The owner of a male or female slave may require of such slave the performance of impure work, such as cleaning the house, the gate-way, the necessary, and the road, removing the dirt and rubbish, and all other impurities: attending the master at his pleasure, and rubbing his limbs. This is to be considered as impure work, and all other work as pure.

In case of disobedience or fault committed by the slave, the master is empowered to correct him by the infliction of

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corporal punishment with a rope, or the small shoot of a cane, or by ignominious exposure. But if the master should exceed this extent of his authority, and inflict punishment upon his slave of a severer nature than that above stated, he is liable to be fined at the discretion of the ruling power. This is conformable to the opinion of *Cátyáyana* cited in the *Ratnácara, Vivádachintámani,* and other authorities.

Q. 2. What offences upon the persons of slaves, and particularly of female slaves, committed by their owners, or by others, are legally punishable, and in what manner?

R. 3. A master has no right to command either his male or female slave to perform any other duties besides those specified in the answer to the second question, nor has he any authority to punish his slave further than in the mode that has been already stated. If he does so, he is liable to a pecuniary fine at the discretion of the ruling power.

Penalty in case the master exceeds his power.

Q. 4. Are slaves entitled to emancipation upon any, and what maltreatment? And may the courts of justice adjudge their emancipation upon proof of such maltreatment? In particular, may such judgment be passed upon proof that a female slave has, during her minority, been prostituted by her master or mistress? or that any attempt of violence has been made upon her person by her owner?

R. 4. The commission of offences of the above nature by the master does not affect the state of bondage of the slave, and the ruling power has not therefore the right of granting his manumission. But if it should be proved that any person having stolen or inveigled away, by fraud and treachery, a child, and afterwards sold it to another, or that any person had compelled another into a state of slavery

Cases in which the ruling power may compel emancipation.

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by force or violence, the ruling power may then order the emancipation of such slave; and if a master, or any other person by permission of the master, should cohabit with a slave girl, before she had arrived at years of maturity, the ruling power may sentence such offender to pay a pecuniary fine, but cannot emancipate the slave girl. Whenever a slave girl has borne a child by her master, such slave, together with the child, becomes free, and the ruling power should sanction their emancipation. This is the law according to *Menu*, *Yájnyawalcya*, and *Cátyáyana* cited in the *Mitácshará* and other authorities.

Sudder Dewanny Adawlut,
March 29*th*, 1809.

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CHAPTER X.

Of Debt.

CASE I.

Q. A person died involved in debt, leaving some property, but not sufficient to answer all legal demands. His three minor sons and his widow took possession of the assets of the deceased's estate. In this case, are the individuals in question bound to liquidate the debts contracted by him?

R. If the assets of the estate have been taken by the widow of the deceased and his sons, they are bound to pay his debts. It is incumbent on a son to exonerate his father by liquidating his debts, and this should be done before any partition of the paternal estate among the sons. The minor sons cannot exercise any power over the patrimony until they come of age, but then the liquidation of the father's debts becomes incumbent on them also. If the widow succeed to the estate, she should discharge the debts; but if the amount of the debt be larger than the property is capable of satisfying, the whole property which the deceased left must be given to the creditors, and then his heirs must be considered as absolved also from all claims.

The heirs who take the assets, are bound to discharge the debts of the deceased.

Ramrutun Dos *v.* Rajoo and others.

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CASE II.

Q. A woman whose husband is living, executes a bond or similar obligation in her own name: in this case, is such instrument valid, and binding on the husband.

Certain descriptions of women competent to contract obligations for which their husbands are answerable.

R. It is a general principle in law, that a wife is incompetent to contract a debt, or to execute any obligation; but if a debt be contracted by a woman of any of the superior tribes, such as a *Brahminee* or a *Cshetrya*, for the support of the family, it must be liquidated by the husband. A husband, however, is liable for any debt contracted by his wife, she being a woman of certain of the inferior classes, such as a milkwoman, &c., whatever may have been the purpose for which the money was borrowed, because the whole of their concerns is under the management of their wives.

Authorities.

The text of *Yájnyawalcya* laid down in the *Mitácsharú*: —"Neither shall a wife or mother *be in general compelled* to pay a debt contracted by her husband or son, nor a father to pay a debt contracted by a son, unless it were for the behoof of the family: nor a husband to pay a debt contracted by his wife."

The passage of *Vishnu* quoted in the *Viramitrodaya*: "Neither shall a wife or mother *be in general compelled* to pay the debt of her husband or son, nor the husband or son to pay the debt of his wife or mother."

Vrihaspati;—"A house-keeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family *during his absence.*"

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Náreda :—" Whatever debt has been contracted for the use of the family by a pupil, an apprentice, a slave, a wife, or an agent, must be paid by the head of the family."

Menu :—" Should even a slave make a contract *in the name of his absent master* for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it."

Yájnyawalcya :—" If the wife of a herdsman, a vintner, a dancer, a washerman, or a hunter, contract a debt, the husband shall pay it; because his livelihood chiefly depends on the labour of such wife."

Cátyáyana :—" The husband, being a vintner, hunter, or fowler, a washerman, a herdsman, a shepherd, or the like, shall pay the debt of his wife: it was contracted in the concerns of the husband."*

Zillah Ghazeepore.

CASE III.

Q. A father with his five sons lived jointly in respect of food and in the conduct of mercantile affairs. One of the sons contracted a debt for his own private use, and not on account of the joint concern. On the expiration of

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* The Hindoo law in this particular seems to be in unison with the principles of English jurisprudence. " A married woman set over the affairs of the household; or of the whole or any portion of her husband's business or trade, binds him by the contracts which she makes respecting matters committed to her management. He is considered to contract through her ministry. In this case, likewise, as well as in the case of necessaries supplied by the wife, there is no rescission at her husband's instance or her own, for want of his special and express sanction."—*Colebrooke's Treatise on Obligations and Contracts*, Part 1st, page 233.

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the period agreed upon for the discharge of the debt, the creditor brought an action against the debtor, who subsequently died before his father and four brothers, leaving a widow. The father and brothers of the deceased are enjoying the joint property. In this case, should the debt be liquidated out of the joint funds of the concern?

The survivors are answerable for a debt contracted by their deceased partner, if the sum borrowed was applied to their use.

R. Supposing the debtor living with his father and brothers as a joint family, and having joint dealings with them, to have contracted the debt for his private use,* and that the produce of the land or other estate purchased with the sum borrowed was expended for the use of the joint family or joint trade, then the father and brothers who jointly possess the ancestral and acquired property should liquidate the debt. But according to the doctrines of *Menu*, the *Mitácshará*, *Vivádachintámani*, *Vivádárnavasetu*, and other legal authorities, debts contracted for the following purposes will not be claimable from them. *Vrihaspati*: "The sons are not compellable to pay sums due by their father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or of wrath, or sums for which he was a surety, *except in the cases before mentioned*; or a fine, or toll, or the balance of either."

Zillah Jungle Mehals,
May 7th, 1822.

CASE IV.

Q. A married woman having borrowed some money from a stranger, appropriated the sum so borrowed to de-

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* This appears to be only half an answer to the query; for it is unquestionable, that the brothers who took the estate are liable for the debts, as far as there may be assets, whether the money was borrowed by the deceased brother for his private use alone, or was expended for the benefit of the family at large.

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fraying the expenses of an action instituted by her for the recovery of her husband's property, and obtained a decree for the same in a court of justice. She executed a bond in favour of the lender for the sum borrowed, conditioning that "her husband should make over to him possession of the property for which she had obtained a decree in her own name, in the event of non-payment of the money borrowed by means of which it had been recovered." When this bond was executed, her husband was absent. Subsequently the lender, in virtue of the bond, brought an action against the borrower of the money, and against her husband, the possessor of the property specified in the bond. The borrower, in her reply to the plaint, acknowledged her execution of the bond and her receipt of the money, but pleaded that the property in question was in her husband's possession; and the other defendant answered by a total denial of the claim, and stated, that his wife had formed a connexion with tho plaintiff, in consequence of which, he had, previously to the institution of this suit, filed a complaint against the plaintiff in the Foujdaree Court; that the magistrate had passed a decision in his favour, ordering his wife to be delivered up to him, and that she was conspiring with the plaintiff to defraud him of his lawful property. In this case, according to law, will the liquidation of the debt be incumbent both on the borrower and on her husband jointly, or only on the former?

When a wife manages her husband's affairs, he is liable for the debts she contracts.

R. It is laid down in the *Mitácshará* and other authorities, that when wives, who, with the consent of their husband, assume the management of his family affairs, contract a debt, the liquidation of such debt rests with the husband; otherwise he is not answerable for it.

Zillah Moradabad,
August 24th, 1810.

Buksheeram *v.* Musst. Durboo and another.

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CASE V.

Q. A man living with his brothers, as a joint and undivided family, borrowed a certain sum of money, and executed a bond, obliging himself to pay the debts by instalments. He (the debtor) proceeded to a distant country without liquidating the debt, while the family was undivided, and for the period of nine years no intelligence of him has been received. Now the debtor's brothers and wife are in the joint enjoyment of the family property, moveable and immoveable. In this case, can the creditor claim payment of his debt from the occupiers of the debtor's estate, or must the claim be deferred until the expiration of twelve years from the date on which the debtor departed from his family house?

The debts of a missing person must be paid by those in possession of his estate, without waiting twelve years for his re-appearance.

R. If a man contract a debt while he lives with his brothers, as an undivided and united family, and subsequently become missing, the debtor's brothers and wife who possess his estate must pay his debts, without waiting for the expiration of twelve years.

Authorities.

Yájnyawalcya :—" If one of *two or more parceners* or undivided kinsmen contract a debt for the support of his family, and either die, or be very long absent abroad, the other parceners or joint tenants shall pay it."

" A debt contracted before partition by an uncle, or a brother, or a mother, for the support of the family, all the parceners or joint tenants shall discharge."

Náreda :—" The creditor need not wait a specific time; for there is no authority *for such a supposition*."

Zillah Tipperah,
July 16*th*, 1812.

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CASE VI.

Q. A creditor, on the death of a debtor, sues his heirs, namely, his widow and brothers; but it is not conditioned in the bond that the debtor's heirs and representatives shall discharge the debt. In this case, are the heirs of the debtor bound to liquidate that debt or not?

The heir who takes the assets of a deceased debtor, must satisfy his creditors, as far as the assets go.

R. If the deceased debtor should have *bonâ fide* borrowed the sum mentioned in the obligation, his widow must fulfil the conditions, provided she was a party to the contract, or promised to discharge the debt, or provided she received his assets, even though there be no mention of the heir's responsibility for the payment. If one of the associated brothers contract debts for the support of the joint family, the other parceners must discharge them. This opinion is consonant to law.*

Zillah Jessore.

CASE VII.

Q. A person died, leaving a widow, who succeeded to his estate, subject to the law which allows her only to enjoy the property with moderation until her death, but not to give or sell it; and having contracted a debt, either to save the property left by her husband or for other purposes, died without liquidating such debt, leaving her husband's brother and brother's son claimants to the property. Her husband's brother took possession of the property, and the other brother's son obtained a decree for a moiety of the same. In this case, will the liquidation of the debt rest with the brother and the brother's son of her husband?

Circumstances under which the husband's heirs are liable for a debt contracted by his widow.

R. Supposing the proprietor's widow, who succeeded him, to have contracted the debt for the payment of rent due

* In the Hindu law, family partnership induces a joint and several obligation.—*Colebrooke, Obl. and Cont.*, Part I, Book 3, §§ 368.

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to Government, or other necessary disbursements to save the estate, or for the purpose of promoting her husband's spiritual welfare, or for the support of the family, or for the due execution of any conditions made by her husband, and to have died prior to the liquidation of such debt, the proprietor's heirs, that is, his brother and brother's son, are bound to discharge the debt. And if the amount was borrowed for the purpose of being appropriated to any other purposes than those specified, such debt must be satisfied by him who becomes possessed of her jewels and other moveable property. This opinion is conformable to the *Dáyabhága, Mitácshará, Vivádachintámani, Dipacalica,* and other legal authorities.

Authorities.

The text of *Náreda* cited in the *Dáyabhága* :—" What remains of the paternal inheritance over and above the father's obligations, and after payment of his debts, may be divided by the brethren, so that their father continue not a debtor."

The necessity of liquidating the debt is recognized by the text of *Goutama* cited in the *Mitácshará* :—" He who takes the assets of a man leaving no male issue, must pay the sum due *by him* ;" and by the text of *Vrihaspati* laid down in the *Vivádachintámani* :—" A father being dead, his sons, whether after partition or before it, shall discharge his debt, in proportion to their shares; or that son alone, who has taken the burden upon himself."*

In the *Dipacalica-Menu* :—" If the debtor be dead, and if the money borrowed was expended for the use of his family, it must be paid by the family, divided or undivided, out

* This is not the text of *Vrihaspati*, but of *Náreda*, in Digest, vol. i, page 275.

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of their own estate." By the term "father," mentioned in all the texts, it must be understood, the father and others.

The debts which are not to be chargeable are noticed in the *Vivádachintámani* :—" A son need not pay in this world money due by his father for spirituous liquors, for lustful pleasures,, for losses at play; nor what remains unpaid of a fine or toll; nor anything idly promised."

Dacca Court of Appeal,
May 29th, 1820.

CASE VIII.

Q. A *Sudra* became surety for a person of his own class, to whom a sum of money had been lent, and died previously to the liquidation of the debt. In this case, is the creditor entitled to realize the debt out of the deceased surety's property?

The estate of a deceased surety, is not liable for the debts of his principal: but *quere?*

R. The creditor cannot realize his debt out of the deceased surety's property, even though payment should not have been made by the debtor. This is the received opinion.*

Zillah Chittagong,
September 25th, 1820.

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* It is not distinctly stated what description of surety was meant, though from the terms of the question it may be apprehended that security for the loan was intended. Supposing this to be the case, the heirs are answerable, and the reply to the question is erroneous. According to the Hindu law, there are three sorts of accessary obligations, the *Prutyiya Prutibhoo, Dana Prutibhoo,* and *Durshuna Prutibhoo.* The first signifies a security for the purpose of confidence, and his undertaking is that which has been described by Mr. Colebrooke as a "*Mandate,* or precedent undertaking of a *mandant* for another's benefit, bidding one trust another, lend him money, allow him credit, manage business for him, or become answerable for his default." The second is that which he terms "*constitute,* or subsequent undertaking

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CASE IX.

Q. A son, being in a state of union with his father as a joint family, died, and no property of the son came into the father's hands. In this case, is the liquidation of a debt contracted by the son incumbent on the father, or not?

Circumstances under which a father must pay a debt contracted by his deceased son.

R. Supposing the son to have died childless, and involved in debt while the family were undivided, and the father not to have received any assets belonging to his son, he is not in this case bound to liquidate the debt, unless the debt were contracted by the son for the purpose of the family support, or for the conduct of religious observances which were incumbent on the family; or unless the father, after the debt was contracted, promised to satisfy the claim of his son's creditor, in which cases the liquidation of the debt becomes incumbent on the father.

Zillah Aligurh,
April 15th, 1818.

CASE X.

Q. A person having borrowed a sum of money, established a shop with the said money, and then died. Subsequently to his death, his father and brothers appropriated all the goods that were in the shop. In this case, is the

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of a person, who engages to pay a subsisting debt, or fulfil an existing obligation of a third party."—*Colebrooke, Obl. and Cont.*, Chap. x, Section 282. It signifies a surety for payment. The third signifies a surety for appearance, and answers to the Persian term *Hazirzamin*, the obligor undertaking to produce the person of the principal, in the event of his not being forthcoming. In the first and last mentioned sort of engagement, the death of the contracting party extinguishes the obligation; but in the second case, the obligation devolves on the representatives of the deceased surety.—See Colebrooke, cited in *Elem. Hindu Law*, Appendix X, p. 463 and 464.

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satisfaction of the debt contracted by the deceased incumbent on his father and brothers, or not? And supposing the debtor to have left a widow, who took no part of the property left in the shop, is she nevertheless responsible for his debt, or otherwise?

R. Under the circumstances stated, the debtor's father and brothers are bound to liquidate his debt, but his widow cannot be held liable for it.

Those who take the property of the deceased are bound to liquidate his debts.

Authorities.

The text of *Yájnyawalcya,* cited in the *Mitácshará* and other books of law:—"If one of *two or more parceners or* undivided kinsmen contract a debt for the support of his family, and either die, or be very long absent abroad, the other parceners or joint tenants shall pay it."

CASE XI.

Q. A man dies involved in debt, and is survived by two minor sons, the elder of whom is only thirteen years of age, and there is no adult representative of the deceased. If any person bring an action against the minors, that action, according to the privileges conferred by the regulations of Government, and to the established usage of the country, cannot be admitted; and it has been provided, that minority continues until the completion of eighteen years of age, after which period majority commences. In this case, according to the Hindu law, is an action brought against the elder son of the deceased debtor admissible or not? And does the liquidation of the debt contracted by the father become incumbent on him?

R. According to law, the action for debt brought against the elder son of the deceased debtor, who is only thirteen years old, is not admissible. When the minor

Neither the property nor person of a minor is liable for

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the debt of his ancestor.

may attain the age of majority, he must discharge the debt contracted by the father, and not previously.*

Zillah Midnapore.

CASE XII.

Q. A person having contracted a debt, becomes a recluse; that is, enters into the order of an ascetic. His ancestral landed property falls into the hands of his brother's representatives. In this case, can the creditor realize his debt out of such property ?

The debts of an ascetic follow his assets in the hands of his representatives.

R. If the individual in question borrowed a sum of money, and relinquished the order of a housekeeper, leaving a patrimonial immoveable estate in the possession of his relatives, in this case, those relatives who are in the enjoyment of his property are liable for the debt; and if they do not liquidate it, the creditor is competent to recover his money due from the debtor out of his property, as *Yájnyawalcya* propounds: "He who has received the estate of a proprietor leaving no son *capable of business,* must pay the debts *of the estate,* or, on failure of him, the person who takes the wife *of the deceased;* but not the son whose *father's* assets are held by another."

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* According to some Hindu legislators, minority continues until after completion of the age of fifteen years, and others state sixteen as the term.

At the expiration of the term of minority, the son and son's son of a person deceased are bound to discharge the obligations of their ancestor; and other heirs are so, provided they take his assets: but under no circumstances is a *minor* answerable for such obligation: and so long as the minority continues, the property left by the deceased cannot be sold for the liquidation of any debt he may have contracted. This subject has been more fully discussed in the chapter treating of Minority, vol. i.

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The law on this subject is more distinctly laid down in the *Mitácshará* and other authorities, in the chapter treating of the payment of debts.

City Chinsurah,
June 13th, 1815.

CASE XIII.

Q. A widow borrowed some money to defray the necessary expenses of her minor son, and executed a bond in the name of her son (with her own signature) to the creditor for the debt. In this case, according to law, is the bond valid and binding on the son?

Necessary debts contracted for an infant are binding on him.

R. Any bond which a mother, having contracted a debt for the maintenance of her minor son, may have executed in the name of such minor son in favour of the creditor, is valid and binding, according to the texts of *Vrihaspati* and other sages, cited in the *Vivádaratnácara, Vivádachintámani, Dáyatatwa*, and other authorities.

Authorities.

"A debt contracted before partition by an uncle, or a brother, or a mother, for the support of the family, all the parceners or joint tenants shall discharge."

"A housekeeper shall discharge a debt contracted by his uncle, brother, son, wife, servant, pupil, or dependants, for the support of the family *during his absence.*"

Zillah Burdwan,
December 4th, 1817.

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CHAPTER XI.

Of Sale.

CASE I.

Q. Of three brothers, whose patrimonial estate, consisting of real property, was joint and undivided, two sold a certain portion, being their own shares, without the consent of their associated brother, who, however, urged no objection at the time when the purchaser got the deed of sale registered and the estate transferred to his name in the records of the Collector's office. In this case, is the sale good and valid, or otherwise?

According to the law of Bengal, unseparated coheirs may sell their own portions of an ancestral estate.

R. When the two brothers sold a portion of their shares of the undivided immoveable property, and when the property was transferred, the other brother expressed no objection to the transaction. It may therefore be inferred, that he was a consenting party thereto; but, even without his sanction, they were competent to sell their own shares; for they are masters of their own wealth. According to the doctrines of the *Dáyabhága*, *Dáyatatwa*, and other law books current in Bengal, the sale is good and valid.

Authorities.

The text of *Náreda,* as laid down in the *Dáyabhága:* "When there are many persons sprung from one man,

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who have duties apart, and transactions apart, and are separate in business and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."*

Dacca Court of Appeal,
February 22nd, 1820.

Sudanunda Surma *v.* Ramchunder Dutt.

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* The authority cited in this case would hardly appear to bear out the doctrine which it is adduced to support, though the passage in reality favours the construction in question, according to the following annotations upon it by Mr. Colebrooke, in his translation of the *Dáyabhága.*

" The passage of *Náreda's* Institutes here cited, is otherwise interpreted by different compilers, and is generally understood as declaring the separate and independent right of *coheirs* who have made a partition. It is so expounded in the *Smritichandrica, Retnácara, Chintámani, Viramitrodaya,* &c. But in the present quotation, it is apparently understood as relating equally to divided and undivided shares."

" The author of the *Viramitrodaya,* giving a summary of this doctrine, says: ' *Jimutavahana,* having cited two passages of *Vyása,* (See *Dáyabhága,* page 31, Section 27,) affirms, that they are not intended to incapacitate a single *coheir* from making a sale or gift; since he has property, defined to be a power of disposal at pleasure, in the case of immoveables, precisely as in that of other effects, and since those texts cannot declare null an actual gift consisting in the relinquishment of the property; for the fact cannot be altered by a hundred texts. But the prohibition is levelled against wicked persons, and is intended to declare the alienations sinful, because it is injurious to the family, if there were no sufficient cause for the alienation, such as the distress of the family, or the like.' So the texts (See *Dáyabhága,* page 32, Section 29) relative to separated *coheirs,* must be explained as above. Accordingly *Náreda* authorizes generally a sale or any other alienation. Since the text specifies the reason, " because they are masters of their own wealth," it relates to immoveables; for it would else be impertinent."

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CASE II.

Q. A landed proprietor died, leaving a widow, a minor son, and a son's son. Subsequently to his death, the widow sold her husband's immoveable property for the support of her minor son and son's son, and for the purpose of discharging the arrears of revenue due from the estate. Under such case, is the sale legal?

Sale by a widow of landed property is good, if necessary for the support of the family.

R. Should a woman, on her husband's demise, sell his landed property for the purpose of maintaining her minor son and grandson, and liquidating the arrears due to Government, the sale must be considered good and valid, for it is necessary to provide food and raiment to the minors, and to discharge the revenue of Government. This is conformable to the *Dáyabhága* and other authorities.

Zillah 24-Pergunnahs.

CASE III.

Q. Is property held jointly by several individuals, subject to be disposed of for the satisfaction of a decree passed against one of the proprietors?

" *Sricrishna* and *Achyuta* on the *Dáyabhága* of *Jimutavahana*, and *Cáshiráma* on the *Dáyatatwa* of *Raghunandana*, remark on *Náreda's* text: (13, 43.) 'This relates to gift or alienation by a well-disposed man. But the prohibition was relative to an ill-disposed person. Consequently there is no contradiction. It is here expressly declared that the gift or alienation is valid without consent of heirs. And thus the prohibition of gift or sale of the whole estate, unless in distress, must be understood as especially regarding immoveables, (land, &c.) rather than chattels, (gems, pearls, corals, &c.) But, if this relate to a man's own acquisitions, the preceding text (See *Dáyabhága*, page 29, Section 22) would be impertinent. For he had of course power over them, since they were acquired by himself.' "

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Joint property is answerable for a debt to the extent of the debtor's share only.

R. Whatever be the legal share of the person against whom the decree had been passed, that alone can be sold, and the sale to that extent is only legal.*

Zillah Jungle Mehals,
June 28th, 1819.

CASE IV.

Q. A landed estate was held in joint tenancy by several individuals, and one or two of the partners joined in selling it, signing the name of one minor sharer of the property to the deed of sale. In this case, is the sale of the estate, with exception of the share to which the infant is entitled, good and valid, or is the entire sale null and void? Supposing the mother of the minor coheir to have consented to the alienation which had been made by his copartners, is the sale of the infant's share thereby rendered complete and binding, or otherwise?

The brothers of a minor are not competent to sell his share of the joint estate, even though the mother be consenting thereto.

R. If one or two of the coparceners, having sold the joint property, sign the deed of sale with their own names, and also with that of their copartner who is under age, the sale of the entire estate is not valid and binding, because all the partners have a right over it, and their property cannot be divested by individual alienation; but sale to the extent of the selling coparceners' shares is good and legal, as they are masters of their own shares, and had a partial right to the property sold. The sale of the minor's portion is null and void, even though his mother have consented to the alienation; for the property of an infant must be preserved until he comes of age. This opinion is conformable to the

* The answer to this question of course presumes that the debt, on account of which the judgment was given, had been contracted for the sole and exclusive benefit of the individual proprietor, and not on behalf of the family at large.

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Dáyabhága, *Dáyatatwa*, *Vivádachintámani*, *Vivádabhangárnava*, *Dwaitanirnaya*, and other legal authorities.

Authorities.

Náreda says: "A gift or sale thus made by any other than the true owner, must, by a settled rule, be considered in judicial proceedings, as not made."

Cátyáyana :—"Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner."

Zillah Nuddea,
June 9th, 1817.

CASE V.

Q. A person had six sons, and died, leaving some immoveable property acquired by himself. The *zemindaree* was settled in the name of the eldest son. On his death, all the sons, having lived in a state of union, enjoyed the produce of the estate The eldest of them, in whose name the settlement of the estate was made, died, leaving two sons, who, subsequently to their father's death, lived with their uncles as a joint family in the same manner as their father had done. In this case, were the eldest brother's sons entitled to sell such property or not? If they have sold, is the signature of all the partners necessary to the validity of the deed of sale, as evidence of their consent to the contract? Or, if the two nephews executed the document without the sanction or knowledge of their uncles, is the sale legal? Or, supposing five of the six partners to have signed the deed of sale, should the contract be nullified by reason of the non-attestation of the remaining partner?

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The consent of all the partners is requisite to the sale of a joint estate, even though the name of one only may have been recorded as proprietor.

R. Where there are many partners of a patrimonial landed estate who lived together as an undivided family, one of them cannot sell the whole property without the sanction of his coparceners. Though the settlement of the estate was recorded in the name of a single partner, this confers no exclusive right on the person in whose name the estate is registered in the public records. The sale by virtue of the deed which was executed without the consent or signature of all the partners, must be considered null and void. The authorities for this opinion are the texts of *Vyása* laid down in the *Dáyabhága* and *Dáyatatwa* :—" A single parcener may not, without consent of the rest, make a sale or gift of the whole immoveable estate, nor of what is common to the family. Separated kinsmen, as those who are unseparated, are equal in respect of immoveables : for one has not power over the whole, to give, mortgage, or sell it."

If an undivided estate, being the property of six individuals, be sold by five parceners, without the consent of the sixth, the sale is illegal, even though it was made under a written instrument executed by all the rest.*

Zillah Cuttack,
March 25th, 1817.

CASE VI.

Q. There was a family, consisting of five uterine brothers, of whom two are adult, and the others under age. Is the eldest brother, in this case, competent to sell the ancestral landed estate which is in common, himself signing for his four brothers, as well as his own name, in the deed of sale? and supposing him to have sold it, is the sale legal, or otherwise?

* Both stanzas are here ascribed by *Jimutavahana* (and similarly by *Srichrishna*) to *Vyása*; but the second is cited in the *Retnácara* as the text of *Vrihaspati*. See note to page 31 of the *Dáyabhága*.

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R. If of the brothers some are adult and others minors, the eldest is competent to sell the paternal immoveable property for the maintenance of his minor brothers, for the performance of their initiatory ceremonies and so forth, for the exequial rites of his father, and for the discharge of the debts incurred by the father; but excepting under these circumstances, he cannot sell any portion exceeding his own share. If he should have made the sale, excepting under those circumstances, it must be considered void.

Circumstances under which a sale of the paternal estate by the eldest son during the minority of his brothers is valid.

Zillah Beerbhoom,
August 20*th*, 1818.

CASE VII.

Q. A landed estate was jointly held by two persons, and one of them being anxious to sell his own portion of the property, the other offered a proper price for it, but he nevertheless sold his interest to a stranger. Under these circumstances, is the sale valid and binding?

R. Supposing the landed property to have been held in joint tenancy by two persons, and, when one of them negotiated a sale to the extent of his own share, his coparcener to have offered him the same price as settled by the purchaser, in such case, the property must be sold to the parcener, and if it should have been disposed of to a stranger, the sale must be set aside."*

Right of pre-emption recognized in joint property.

Moorshedabad Court of Appeal,
December 31*st*, 1816.

* According to the Hindu law, there is no right of pre-emption, either in the schools of Bengal, Benares, or Mithila; but the two latter forbid the sale of undivided property. I have not been able to discover any work which confirms the doctrine laid down in the *Muha-nirbana Tuntra* as to pre-emption, and I entertain some doubt as to the accuracy of this opinion. It appears at best to be founded rather on the inability of a coheir to sell his share of joint property than on the ground of vicinage; and in Bengal, as that inability does not exist, there could not, I imagine, be any legal claim of pre-emption. See Case 8.

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CASE VIII.

Q. A deceased Hindu was survived by his adopted son, who sold his adopting father's landed estate to a stranger. The purchaser is now digging a tank in the land, and the adopting father's brothers claim the right of pre-emption, and want to purchase the property sold. In this case, will the sale by the adopted son become null and void, and are the claimants of pre-emption entitled to the estate?

There is no right of pre-emption according to the law of Bengal.

R. The sale of a person's own share of property, whether consisting of moveables or immoveables, is according to law valid and binding, and it cannot be avoided by the seller's uncle's sons claiming the right of pre-emption.

Authorities.

"If they severally give or sell their own *undivided* shares, they do what they please with their property of all sorts; for, surely, they have dominion over their own."

Zillah Burdwan,
December 3rd, 1819.

Adwita Dutta *v.* Kissenmohun Dutta and others.

CASE IX.

Q. A *Sudra* died possessed of some landed property, leaving a widow, a daughter, and a daughter's son. A part of the property had been usurped by a stranger; and the daughter's son of the proprietor, with the sanction of his grandmother, instituted a suit to recover possession of the portion usurped. In this case, will the property in question go to the daughter's son or not? Supposing the original proprietor's widow, notwithstanding she had a daughter and daughter's son living, to have disposed of a portion of her husband's landed estate by sale, without their

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consent or knowledge, and not to have received the full value of the property from the purchaser; in this case, is the sale to be considered valid and binding, or otherwise?

Sale by a widow without the consent of the next heirs, of any part of the property devolved on her from her husband is invalid, except under special circumstances.

R. If a part of the deceased proprietor's immoveable property have been forcibly seized by a stranger, and his (the proprietor's) daughter's son have instituted a suit to recover the property from the hands of the usurper, with the consent of the proprietor's widow, the daughter's son is entitled to the property in dispute, by reason of his being next heir to the deceased. Either a gift or sale, or any other alienation of the immoveable property which had devolved on the widow, unless for the completion of her husband's exequial rites, or the like necessary observances, is illegal. Whatsoever sum may have been settled as the value of the property sold, if the whole amount had not been paid by the vendee, the sale must be held invalid.

Authorities.

Vrihaspati:—"A possession by strangers for three generations, gives no doubt, an absolute title; not a possession by kinsmen within the degree of *Sapindas*. The property of a house, arable land, a market, or other immoveables, which are possessed by a friend, or a near kinsman in the male or female line, who is not the proprietor, shall not be lost to the *rightful* owner, nor shall the husbands of daughters, nor learned priests, nor the king, nor his ministers, acquire a title even by a very long and quiet possession."

These texts are laid down in the *Dáyabhága* and other law works. Thus in the *Mahábhárata*, in the chapter entitled *Dánadharma*, it is said: "For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth." "Even use should not be by wearing delicate

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apparel and similar luxuries: but since a widow benefits her husband by the preservation of her person, the use of property sufficient for that purpose is authorized. In like manner, (since the benefit of the husband is to be consulted,) even a gift or other alienation is permitted for the completion of her husband's funeral rites. Accordingly the author says, 'Let not women make waste.' Here 'waste' intends expenditure, not useful to the owner of the property. Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property; or, if still unable, she may sell or otherwise aliene it: for the same reason is equally applicable."*

Cátyáyana:—"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." "Abiding with her venerable protector;" that is, with her father-in-law or others of her husband's family, let her enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage, or sale of it at her pleasure."—This is the opinion of the author of the *Vivádachintámani*.

Vrihaspati:—"What has been sold, at a low price, by a man inebriated or insane, or through fear, or by one not his own master, or by an idiot, shall be given back, or may be taken *forcibly* from the buyer."

City Dacca,
February 3rd, 1817.

CASE X.

Q. There were three uterine brothers in joint possession of some ancestral landed property. One of them staid at

* *Dáyabhága*, p. 182.

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home to conduct the affairs of the family, and superintend the estate, and the other two proceeded to a foreign country to obtain office. In this case, is the brother who manages the estate, entitled to sell or mortgage the property for a certain term, while the other brothers are at a distance?

The sale by the managing partner of an entire estate is valid in a case of necessity.

R. If two of the three associated brothers, having left a brother at home to manage their joint property, proceeded to a distant country to obtain office, the managing brother may mortgage and sell the whole or a part of the undivided patrimonial property for the support of the family and religious purposes, even though there be no consent on the part of his coparceners; in like manner as he may, without his brother's sanction, dispose of his own share for the maintenance of his own dependants. This is conformable to the *Dáyabhága, Dáyacramasangraha,* and other legal authorities.

Authorities.

"But if the family cannot be supported without selling the whole immoveable and other property, even the whole may be sold or otherwise disposed of."—*Vrihat Menu.* "The support of persons who should be maintained, is the approved means of attaining heaven: but hell is the man's portion, if they suffer. Therefore (let the master of a family) carefully maintain them."—This is the doctrine contained in the *Dáyabhága.*

"Should even a slave make a contract *in the name of his absent master* for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it." "The term 'contract' means sale and the like."—*Dáyacramasangraha.*

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"But, at a time of distress, for the support of his household, and particularly for the performance of religious duties, even a single coparcener may give, mortgage, or sell the immoveable estate."

"If a debt be incurred by a slave for the support of the family of his master, it must be discharged by the master."—This is the opinion of the author of the *Vivádachintámani.*

"For here also, (in the very instance of land held in common,) as in the case of other goods, there equally exists a property, consisting in the power of disposal at pleasure." Accordingly *Náreda* says: "Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."—This is the doctrine of the *Dáyabhága.*

"*As in the case of other goods:*" "Meaning goods which are common." "*Here also:*" "In the very instance of land held in common." "*Equally exists:*" Intending that there is no distinction of ownership. Since therefore there is no general property of parceners in the whole estate, it is fallacious to suppose that a plurality of owners constitutes community, and community must therefore be considered as meaning the state of not being separated. For as propriety exists in the common property, even before partition, there is nothing to prevent the gift or other alienation by a parcener of his own share, even at that time. This is the opinion entertained by the author of the *Dáyabhága,* who maintains a partial right to a certain portion (of the estate ascertained by partition) vested in each individual owner. Accordingly *Náreda* says, "Should they give or sell their own shares," and thereby shews, that in transactions about to be concluded by one parcener, he has the power to give or otherwise dispose of

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his own share, without the consent of the rest. This is the opinion also of the author of the *Dáyacramasangraha.*

Calcutta Court of Appeal,
January 13th, 1817.

Goopeekanth Thakoor *v.* Cumulakanth Thakoor and others.

CASE XI.

Q. A landed proprietor sold his estate to the plaintiff's father, and he executed a deed of sale for the same in the purchaser's favour; but, when the sale was contracted, the estate was under a mortgage, on which account the seller was unable to deliver the property sold into the purchaser's possession. Five years after the transaction, the vender sold the same estate to the defendant, and having redeemed the mortgage with the purchase money, delivered it to the defendant (the second vendee), who is still in possession of the estate. In this case, will the property in question revert to the first purchaser, or will it remain with the second one?

A sale of mortgaged property is valid, and becomes complete on discharging the incumbrance.

R. If a person having sold his lands to one individual, again sell the same property to another person, the first purchaser is entitled to the property. This is consistent with the general opinion.*

Zillah Chittagong,
July 30th, 1813.

Magun Doss *v.* Mudunmohun and others.

* "In all other contested matters, the latest act shall prevail; but, in the case of a pledge, a gift, or a sale, the prior contract has the greatest force." It may be objected, that according to this doctrine, the first sale should be avoided by the mortgage, from its having been made previously to the sale. The meaning of the text, however, is, that where a person mortgages his property for a valuable consideration to one person, and mortgages the same property to another, the first mortgage shall hold good; but in a case where a man mortgages

CASE XII.

Q. There were three uterine brothers, who held their patrimonial lands in joint tenancy. Two of the brothers died, each leaving a widow, and the other brother still survives. The estate is jointly possessed by these individuals. The widows, being much distressed for the means of maintenance, sold a part of their husbands' shares of the joint landed estate, without the consent of their husbands' brother, and appropriated the purchase money to their own use. In this case, is the sale good and valid?

The sale by a widow of her husband's landed property is valid, if necessary to her maintenance.

R. The text of *Vrihaspati* cited in the *Dáyabhága* :— "Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, a mother, or uterine brethren be present."

"Therefore the widow of a person dying without male issue takes his entire heritage, even though his father and brother be living, because she confers benefit on her deceased husband by preserving her life with the enjoyment of his wealth, and by offering oblations to his manes: and if she, having become indigent, defile her chastity, then hell becomes her husband's portion. Under these circumstances, the preservation of her chastity and life is absolutely necessary. If, with the produce of their husbands' estate, their maintenance cannot be supplied, they (the widows) for the purpose of acquiring the means of subsistence, may mortgage or sell a portion of their husbands' landed estate, and the sale in such case is legal and valid.

August 27th, 1808.

Dowlut Singh *v.* Bukhtawur Singh.

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his property, and subsequently makes a sale of the same property, the latest contract will have superior force, on the satisfaction of the debt for which the property was mortgaged : in other words, that a prior pledge shall avoid a subsequent pledge, not that a prior pledge shall avoid a subsequent gift or subsequent sale.

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CASE XIII.

Q. Are *Devutter* lands and houses appropriated to religious uses, fit subjects of sale or not?

R. If the lands have been endowed for the worship of some deity, and the house be occupied by it, the donor has no right in the endowment, and consequently he is incompetent to sell such property. The following is the doctrine laid down in the eleventh section of the *Srimadbhagavata*: "He who seizes the subsistence of the gods or of priests, whether given by himself or another, is born a reptile in ordure for a million of million years."

The sale of endowed property is void.

Dacca Court of Appeal,
November 27th, 1820.

CASE XIV.

Q. Is a minor competent to sell his ancestral landed estate or not? Supposing him to have executed a deed of sale, and not to have received the sum stipulated in it; in this case, is the sale valid and binding?

R. A minor has no power to sell his immoveable property; and if he have not received the amount specified in the bill of sale, the sale is invalid.

Sale by a minor of his landed property is void.

Zillah Jungle Mehals,
May 14th, 1817.

CASE XV.

Q. Can a slave sell his daughter of three years old, while his master is living?

R. A slave is not competent to sell his issue without his master's consent, and the sale under such circumstances is illegal and void.

The sale by a slave of his own issue is void.

Zillah Sylhet,
December 2nd, 1815.

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CASE XVI.

Q. A family, consisting of three brothers, held a patrimonial landed estate in joint tenancy, the eldest of whom, without coming to a partition, sold a moiety of the estate, with the consent of his youngest brother, but without the consent of the second brother. In this case, is the eldest brother competent to sell such property; and if it be sold, is the sale good and valid, according to the law as current in Orissa?

According to the law as current in Orissa, the sale of a portion of joint property is void.

R. The eldest brother is incompetent to sell one-half of the joint patrimonial real estate without coming to a partition, or defining his legal share, having only the sanction of his youngest brother; and the sale in such case is null and void.*

Zillah Midnapore,
March 15th, 1813.

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*According to the authorities as current in Bengal, the sale of joint immoveable property by one of the parceners, to the amount of the seller's share, is not forbidden; and if he sell the whole estate, the sale is not valid, so far as regards the shares of his other partners, but is valid so far as regards his own share; and if it be disposed of with the consent of all or some of the coparceners, the sale is valid, so far as regards the shares of the consenting partners; consequently the sale of the moiety of the joint property by the eldest brother, with the sanction of the youngest only, could not have been nullified, had the case happened in Bengal, by reason of his selling the property over which he had no exclusive right. In support of this opinion, the following extracts from Juggunnath's Digest may be here cited:

"It is questioned whether his own property be or be not annulled by the act of a single parcener. It should not be said, that his own property is not annulled, because the gift, being improperly made, is in its own nature imperfect, and is void, as the act of a man partly destitute of ownership. There is nothing to prevent the annulling of *his own* property, since the gift, which he himself makes with the intention of annulling the rights of all the parceners in that chattel, is the act of an owner, of whom property is predicable. Consequently

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CASE XVII.

Q. A person having borrowed a certain sum of money, mortgaged his landed estate for the same, and afterwards the mortgagor sold the same estate to another individual without liquidating the debt; but the property mortgaged was taken possession of by the mortgagee after the sale. In this case, is the sale, without the discharge of the debt for which the property was pledged, valid and complete; or is the mortgagee to retain possession of the property mortgaged until his claim be satisfied?

R. If a person mortgaging his immoveable estate to another, contract a debt to him upon condition that until he (the debtor) discharge the debt, the mortgage should not

Mortgaged property cannot be alienated by the mortgagor, except under certain conditions.

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the ownership of the giver appears in this instance to be alienable: but the ownership of the rest subsists in full force. The meaning of ancient authors, who hold a gift of joint property to be void, is the same. But a parcener's gift of his own share is valid. All the brothers have each their respective predicable property in all the effects."

"Joint property is wealth belonging to more than one owner. *Misra* says, the gift is invalid, because a man has not full dominion over joint property, a wife, or a son; and the want of dominion, *in the other instance*, is *deduced* from the *same* reasoning, *which proves it in the case* of joint property. By "the same reasoning," he means that the ownership of one cannot be annulled by another. From *Misra's* exposition it is inferred, that a parcener's gift of his own share of undivided property is void. But, to reconcile the two opinions of different authors, we adopt the sense inferrible by reasoning, and say; a gift of the whole joint property is void, not a gift of the parcener's own share:

"Thus the donor cannot, at his own choice, annul the ownership of others; but he is not debarred from aliening his single right in the joint property; for such acts by partners in trade are often seen in common practice. This may be stated as the opinion of *Vachespati Bhattachárjya* and *Vijnyaneswara.* Therefore the gift is valid, as far as the donor's share is concerned; but he shall be punished, and must perform penance."

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be redeemed; in this case, the sale or gift of such property, previously to the fulfilment of the condition, is illegal, and the mortgagee may keep the property in his own possession. But if the mortgagor, without redeeming the property, be desirous of giving or selling it, it is necessary for him first to give an order on the donee or vendee for the payment of the debt, and to get that order accepted by the mortgagee, in which case he may dispose of the mortgaged property by gift or sale; and by doing so, the debt becomes due from the donee or vendee, and he (the donee or vendee) then stands in the place of the mortgagor. The mortgagee is competent to keep the property in his hands until the whole amount of the debt be satisfied. This is consonant to the *Mitácshará* and other works.

Authorities.

"Nor after a great length of time, *or when the profits have amounted to the debt*, can he assign or sell such pledge."*

"To the debtor, who comes to redeem his pledge, the creditor shall restore it, or be punished as a thief; and, if the creditor be *dead or absent*, the debtor may pay the debt to his kinsmen, and shall take back his pledge."†

"In this case, the creditor returning from abroad may restore the pledge, on receiving so much money *as was due when the pledge was valued.*"—This is laid down in the *Mitácshará* and other authorities.

Zillah Agra,
July 13th, 1809.

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* Last stanza of a text of *Menu.*

† *Yájnyawalcya.*

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CASE XVIII.

Q. A person was survived by two sons and a widow. In this case, to what proportion of his property, moveable and immoveable, are these persons respectively entitled; and can the sons, without coming to a partition of the paternal estate with their mother, legally make a sale of the whole of the property?

Sons are not at liberty to sell their mother's portion.

R. According to law, the widow and the sons are entitled to equal shares of the deceased's property, and neither party is competent to sell the other's share without the consent of the other. If one of them be desirous of selling his own portion, he may do so after having come to a partition with his coheirs. Should one parcener sell the share of another without his sanction, both the seller and purchaser are subject to punishment (by the ruling power) commensurate to their offences.

Zillah Moradabad,
June 29th, 1819.

CASE XIX.

Q. A person leaving a widow and a son, died possessed of some landed property in joint tenancy. Subsequently to his death, his son died childless, and his share of the joint property was illegally taken possession of by his father's brother's sons. The widow made a gift of the property in question to her daughter's son, and having joined with him (the donee), sold it to a third person. In this case, is the sale legal and valid?

Sale by a widow with consent of next heir is valid.

R. Under the circumstances stated, the sale of the joint property by the widow, with the consent of her heir, being the grandson of the female line, is good and valid.* This is consonant to the *Smriti Shástra.*

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* It is a general rule, that every description of alienation by a female of property devolved on her by inheritance is forbidden; but

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Q. Supposing the widow, with the assent of her daughter's *minor* son, to have contracted the sale; in this case, is the sale legal or otherwise?

R. If the widow have sold the property for the purpose of procuring the necessaries of life, or from being unable to manage the estate, with or without the assent of her minor, unless such heir was a minor grandson in the female line, the sale is valid; but under other circumstances, if she have sold the property unnecessarily, with or without the minor's assent, should he be desirous to nullify the alienation, he may do so, and the sale made by her will become void.

City Moorshedabad,
August 23rd, 1822.

CASE XX.

Q. A, B and C are three brothers, proprietors of an undivided landed estate. A dies, leaving a son D; B dies, leaving a son E; and C dies, leaving a son F. F dies, leaving four sons. On the death of A, the estate was registered in the name of D; and during the minority of the sons of F, it was about to be sold by public auction on account of arrears of revenue. With the view of saving the estate, D, in concert with E, made a mortgage and conditional sale of it to a stranger, and the conditional sale ultimately became absolute, in consequence of the money borrowed not being repaid to the mortgagee within the stipulated period. Now the heirs of F have sued to recover their share, alleging that

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she may make a transfer for certain purposes, and also with the consent of her husband's next male heir. But if a widow, having succeeded her husband, should dispose of his property by gift or other alienation, with the sanction of her husband's next male heir, and the heir consenting, die before the widow; it might be a question, whether, on the death of the widow, her husband's heir, male or female, who has the right to succeed in default of the consenting party, would be entitled to annul the contract made by the widow.

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the sale took place without their consent, and during their minority. Is such sale, made during the minority of the heirs of F, valid according to law?

R. D and E being the elder brothers of the family, and managers of the affairs, and having disposed of the property in a time of distress and through necessity, such act is valid; and here the sale is good, because the estate was disposed of to prevent its being sold by public auction.

A sale by one partner of an undivided estate, if justified by necessity, is good and binding upon the other partners.

Authorities.

"Even a single individual may conclude a donation, mortgage, or sale, of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes."—The text of *Yájnyawalcya* cited in the *Mitácshará*, *Calpataru*, and other authorities current in Behar.

Zillah Shahabad,
April 1st, 1820.

Heirs of Goodree Singh *v.* Gooman Singh and Bustee Singh.

CASE XXI.

Q. A woman, during the lifetime of her insane husband, sells a portion of his landed property for the purpose of performing the funeral obsequies of her mother-in-law. In this case, according to law, is the sale complete and binding?

R. Should a wife sell a portion of her husband's estate, he being childless, and of confirmed insanity, for the purpose above stated, such sale is good in law.

Sale by a wife of her insane husband's estate when valid.

Zillah Sylhet,
November 26th, 1817.

Sibpersaud *v.* Sooberna Dassea.

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CASE XXII.

Q. Can a person, having a son, a daughter, and a wife, sell his whole ancestral landed estate to a stranger?

Sale of a man's entire property allowable under what circumstances.

R. If a father, having sons and other heirs, sell his entire patrimonial immoveable property without their consent, or without extreme necessity, such as to render the sale necessary for the purpose of the family support, the sale is void and illegal; but under such necessity the act is allowable.—This opinion is conformable to the *Vivádachintámani*, *Vivádaratnácara*, *Vivádachandra*, and other authorities.

Authorities.

Cátyáyana:—"A wife or a son, or the whole of a man's estate, shall not be given away or sold without the assent of the persons interested; he must keep them himself; but in extreme necessity, he may give or sell them *with their assent*; otherwise, he must attempt no such thing: this has been settled in codes of law. Except his whole estate and his dwelling-house, what remains after the food and clothing of his family, a man may give away, whatever it be, *whether fixed or moveable*; otherwise it may not be given."

If the sons and the family cannot be supported without selling the whole real estate, or if the father, reserving such portion as may suffice for the maintenance of the family, sell the entire patrimonial landed estate, the sale is good and legal.

Dáyabhága:—"But if the family cannot be supported without selling the whole immoveable and other property, even the whole may be sold, or otherwise disposed of."

Zillah Nuddea,
May 12th, 1817.

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CASE XXIII.

Q. A landed estate was purchased jointly by A and B. The latter died, leaving his four sons, namely, C, D, E and F. Subsequently to B's death, one of his sons, F, died leaving a widow. Afterwards the surviving three uterine brothers (C, D and E,) and A sold the whole estate. In this case, is the sale of such property, without the sanction of F's widow, valid and binding, or not? And has the widow any right over it, or is she only entitled to food and raiment from her husband's brothers?

R. Supposing F to have been separated from his brothers by obtaining a division of the estate, and then to have died, in that case, his widow is entitled to his estate. If no separation between F and his brothers took place, or if he, having separated from his brethren, reunited with them, his widow can only have her maintenance from her husband's brothers until her death. If after partition there was a reunion with one only of the brothers, the reunited parcener is alone bound to provide his coparcener's widow with maintenance; and under these circumstances, the widow's consent is by no means necessary to the validity of the sale.

Circumstances under which three brothers can effect the sale of an estate without the consent of the widow of a fourth brother.

Zillah Moradabad,
April 27th, 1813.

CASE XXIV.

Q. Two brothers are living in the same house, and joint sharers of an undivided estate. One of them disposes of his unascertained share of the estate by a deed of sale to a stranger. Is such sale good against the heirs of the other? An answer to this question is required to be delivered according to the law of Bengal.

According to the law of Bengal, the sale by one parcener of his own undefined share of an estate is good and valid.

A. Such sale is good and valid.

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Authorities.

Authority for the above opinion.

1. Although the two texts of *Vyasa* are quoted in the *Dáyabhága* :—" A single parcener may not, without consent of the rest, make a sale or gift of the whole immoveable estate, nor of what is common to the family," and " separated kinsmen, as those who are unseparated, are equal in respect of immoveables; for one has not power over the whole, to give, mortgage, or sell it;" yet the author proceeds to state, it should not be alleged that by these texts one person has no power to make a sale or other transfer of such property. For here also (in the very instance of land held in common), as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure. But the texts of *Vyasa* exhibiting a prohibition are intended to shew a moral offence: since the family is distressed by a sale, gift, or other transfer which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer.—*Dáyabhága.*

Ditto.

2nd. Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth.—Text of *Náreda* cited in the *Dáyabhága.*

3rd. The gift or other transfer of immoveable property even, whether divided or undivided, is valid, because it is practicable to ascertain the respective shares at a subsequent period by the casting of lots or other means.—Commentary of *Sricrishna Tarcálancára* on the *Dáyabhága.*

Sudder Dewanny Adawlut,
April 8th, 1815.

Byjnath Bunhoojea, Appellant *v.* Sumbhoochund Bunhoojea, Respondent.*

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* *N. B.*—This opinion was delivered in opposition to that of the Pundit of the city court of Patna, who had ruled, that a sale by an

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CASE XXV.

Q. A widow of the fourth class who had no son, having reserved some immoveable property left by her husband for her own maintenance, disposed of the remainder by a deed of gift in favour of her husband's brother's sons, her own daughter's son being present at the time, and not objecting. Fifteen years after the gift, she sold the property (which had been already given) to a stranger, and the deed of sale was attested by her daughter's son. In this case, which of these transactions should be upheld ?

Prior gift invalidates subsequent sale after the lapse of fifteen years.

R. It may be inferred that the donor's daughter's son consented to the gift, from his making no objection at the time, or during the period of fifteen years subsequently to the gift. The gift, therefore, should be considered valid and binding. The sale which was witnessed by the daughter's son cannot be considered complete, for there existed no right in the widow over the property sold. Both gift and sale are the means of the extinction of property. Here the first act, in other words, the gift, shall prevail.

Authorities.

The following are the texts of *Náreda, Cátyáyana,* and *Vrihaspati* :—" If a man, having bailed or pledged a thing to one person, pledge or sell it to another, the first act shall prevail." " In all *other* contested matters, the latest act shall prevail ; but, in the case of a pledge, a gift, or a sale, the prior contract has the greatest force."*

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unseparated coparcener of his own unascertained share of the joint undivided estate is not valid, and quoting the above texts of *Vyasa* in confirmation of his opinion.

* *Yájnyawalcya.* See Digest, vol. ii, page 78.

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CHAPTER XII.

Of Evidence.

CASE I.

Q. 1. A person purchased some male and female slaves, and obtained a deed of sale for them, with the attestation of the seller's other slaves as witnesses. Subsequently a dispute arose between the parties, and the purchaser brought an action against the seller and the slaves purchased, and pointed out the seller's other slaves as those who witnessed the bill of sale, and could depose in his favour. In this case, is the evidence of such slaves good and legal?

R. 1. Under the circumstances stated, the seller's slaves' evidence on the part of the plaintiff is good and legal. **A slave may be witness against his master,**

Q. 2. In a suit instituted for slaves, whether male or female, the suing party produces his own slaves to prove his claim. Is the evidence of such slaves good and valid?

R. 2. The evidence of a slave for his master cannot in any case be held to be admissible. **but not for him.**

Q. 3. Is the evidence of the slaves of the plaintiff's relations admissible in his behalf?

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The slaves of the plaintiff's relations are good witnesses.

R. 3. The evidence of the slaves of the plaintiff's relations is good in law; and there does not exist, on the score of such relationship to the plaintiff, any objection to the testimony of the slaves on his behalf being received.

Zillah Tipperah, July 5th, 1813.

CASE II.

Q. A person produced a witness (who was indebted to him) to depose in his favour in a court of justice. In this case, is the debtor's evidence good for the creditor or not?

A debtor may give evidence in favour of his creditor.

R. The debtor's evidence in behalf of his creditor is available, provided he depose impartially, and there exist no other objection to his competency.

Zillah Sylhet, September 15th, 1817.

Chakooram Surma *v.* Boodh Sing and others.

CASE III.

Q. A person instituted a suit, claiming a cow, alleging that it had been pledged to him: and his adversary, denying the pledge, pleads that he had purchased the animal, and wishes to prove his plea by the evidence of the plaintiff's wife, daughter, mother, and sister. In this case, are such females good and legal witnesses?

A defendant cannot avail himself of the evidence of the plaintiff's female relations.

R. If in the case abovementioned, the defendant met the plaint by the special plea* *(Pratyavascundana)*, that he had purchased the animal, and wished to prove such

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* A confession, a denial, a special exception, and a plea of former judgment, are the four sets of answer.—*Mitácsharà.* For further information on this subject, see the chapter on Judicial Proceedings, &c., vol. i, which contains a summary of the Hindu law relative to evidence and other legal topics.

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plea by the evidence of the plaintiff's wife, daughter, mother, and sister, the evidence of those individuals is not available in law.

Zillah Jungle Mehals,
February 7th, 1817.

CASE IV.

Q. A woman, having committed adultery with her husband's brother, brought an action against him for maintenance, and selected his (the defendant's) wife to prove the fact in question. In this case, is the evidence by a single female valid or not?

In the case of a female, the evidence of a single female is admissible.

R. If the woman, having committed adultery with her husband's younger brother, sue him for her maintenance, and produce the defendant's wife as evidence, the case being that of a female, the evidence of a single female is good and legal.

Zillah Jungle Mehals,
February 7th, 1817.

CASE V.

Q. Is it lawful to receive in evidence the deposition of a person afflicted with leprosy?

A leper cannot be a witness.

R. The testimony of a leper is not admissible.

Zillah 24-Pergunnahs,
November 9th, 1808.

Bidianath Haldar *v.* Hurchunder Haldar and others.

CASE VI.

Q. The plaintiff has no evidence to prove the truth of his allegations, and wishes, as a test, to enforce the oath of the defendant. In this case, should an oath be administered to the defendant?

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A defendant's denial may be required on oath, in default of other evidence.

R. According to the doctrine of *Menu, Yájnyawalcya,* and other holy sages cited in the *Mitácshará* and other authorities, an oath should be administered to the defendant.*

Zillah Moradabad,
March 22nd, 1804.

Manikchurn Brahmin *v.* Gunganarain and others.

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* But this doctrine must be received with some limitation. Ordeals of any kind should not be resorted to, except on failure of all other evidence; and there are various descriptions of ordeal applicable to particular cases, for an account of which see the chapter on Judicial Proceedings, &c., vol. i.

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AN INDEX

TO

PRECEDENTS OF HINDU LAW.

ACHARJYA.

1 An *acharjya* or spiritual teacher is ranked among the heirs according to the Hindu law, but not a *gooroo*. In default of heirs, the property of a person deceased escheats to the king, except he be of the *Brahminical* order. ... 100

ACQUISITIONS.

1 Property acquired by exclusive labour, without using the patrimony, goes to the acquirer solely. ... 6

2 But property acquired by a father is on his death inherited equally by all his sons, whether they aided in the acquisitions or not. ... 7

3 Bengal school distinguishes with respect to. ... 7

4 Of acquisitions made by a joint family, the father is entitled to one-half, and the acquirer to a double share. 32

5 Property acquired without using the patrimony by one brother living in partnership, belongs to him exclusively ... 33

6 Land purchased by one coparcener with borrowed money cannot be claimed by another who was not joining in the transaction. ... 151

7 Property exclusively acquired by one man is not to be shared by his brethren, though messing with him. 152

8 And if one build a house on joint land, the others have no share in it, but only a claim for so much land elsewhere. ... 152

9 Brothers living jointly are entitled to share their acquisitions to the amount of the funds contributed by them respectively ... 154

10 A man is not obliged to share with his own brethren, (though undivided,) that which he has acquired by his own unassisted means... 155

11 One brother, though of an united family, has no claim to the property of another, if made by separate funds and labour. ... 156

12 One-fourth, over and above his own share of a recovered family estate, goes, on partition, to him who recovered it ... 158

13 The acquirer takes a double share on partition, where ancestral property has been used in making the acquisition ... 158

14 Property acquired by brothers should be distributed among them according to the labour and funds employed by each ... 160

Digitized by Google

15 Where joint funds have been used, a double share only goes to the acquiring brother. ... 160
16 A man has no title to share in acquisitions exclusively made by his unseparated brother. ... 161
17 The acquisition of a man made by his own means alone is not divisible among his brothers. ... 161
18 A brother (whether he be of the half or whole blood) cannot share the acquisition exclusively made by his brother without the use of the patrimony; but if it were made by the use of joint funds, according to the law as current in Bengal, the acquirer should have twice as much as the rest of his partners; but to any augmentation in the nature of an increment this rule does not apply, and all the brethren share equally... 162
19 Acquisitions made by a man jointly with his brother's four sons, by means of joint funds, will be divided into two portions, of which one will be taken by the man himself, and the other be shared equally by the four sons of his brother. ... 162
20 Property acquired by one of four brothers with the aid of his father's funds and labour, will on partition be made into ten parts, of which five will go to the father, two to the acquirer, and one to each of his brothers: if acquired without any aid, into two parts, the father taking one, and the acquirer one. ... 164
21 The son of one of five brothers, though his father was insane, is entitled, on partition, to one-fifth of property acquired by joint funds. 165
22 A *jageer* or other grant acquired at the expense of the patrimony, does not belong exclusively to the acquirer. ... 166
23 Though science should have been the means of acquisition. ... 167
24 The acquirer taking a double share. ... 167

ADOPTION.

1 The adopted son of a brother excludes the son and grandson of an uncle. ... 74
2 In Bengal, the adopted son of a sister takes a seventh, as coheir with three sons of another sister ... 89
3 But according to the law of Benares, the property would have been made into ten parts, of which the adopted son would take one. There is no express authority for the succession of the adopted son of a sister, but his right is admitted by inference. ... 89
4 An adopted son's widow takes the property of his adopting mother, to the exclusion of such adopting mother's daughter and her sons. 105
5 Even though the adopted son should not have taken possession before his death. ... 106
6 An unmarried person may adopt. ... 175
7 A widow cannot adopt a son without the permission of her late husband. ... 175
8 A written instrument is not necessary to the validity of an adoption. ... 176
9 Period of, not absolutely restricted to the fifth year ... 177
10 An only son cannot be given in adoption. ... 178
11 Remark of the Sudder Dewanny Adawlut cited relative to the doctrine of ... 178
12 An only son cannot be adopted according to the *Dattaca* form. 179
13 The giving in adoption of an only son is equally illegal with the receiving of him in adoption. ... 179
14 A widow being a minor, may adopt a son under instructions from her late husband, though her husband's brothers are living. ... 180
15 A boy may be adopted after tonsure by the natural father in the name of the adopter ... 181
16 A widow having received instructions from her husband to adopt a son, cannot make two adoptions at the same time. The one made secondly will be invalid. ... 181
17 A woman cannot adopt a son *(Dattaca)* without the permission of her husband, nor can an only son or the eldest son be given in adoption ... 182

Digitized by Google

18 A son given (*Dattaca)* cannot inherit his own father's property. 183
19 A woman's assertion that she had been authorized by her late husband to adopt a son, is not sufficient proof ... 183
20 An adopted son may lawfully bind himself not to take possession of the estate until after his adopting mother's death, and to forfeit it on breach of the condition ... 184
21 An adopted sharing with a son of the body, is entitled to a fourth 184
22 But according to the law of Bengal, he may claim a third .. 185
23 A daughter's son may be adopted in preference to a brother's son; but see note ... 186
24 Among the *Sudras*, the adoption of a sister's son is valid ... 187
25 Ancestral property which had devolved on a daughter will not at her death go to her adopted son, but to the heirs of her father .. 188
26 The adoption by a widow of a son without the express permission of her husband, is illegal. The consent of her husband's heirs is not sufficient, according to the law of Benares ... 189
27 Authority for the above opinion..190
28 The adoption of an only son is invalid ... 192
29 Unless according to the *Dwamushyayuna* form of adoption, by which the person affiliated is considered to be the son both of his natural and his adoptive father ... 193
30 The only son of a distant relation cannot be received in adoption. 195
31 Nor the eldest son living, though not the first-born ... 195
32 A widow (inhabitant of Tirhoot) may adopt a *Critrima* son without her husband's permission ... 196
33 And after the ceremony of *Upanayana* has been performed on the boy ... 196
34 A son of a brother may be taken as a *Critrima* son ... 197
35 Even though he be an only son ... 197
36 An adoption is not valid without the observance of certain prescribed forms ... 198
37 In adoption, the exact observance of any particular ceremonies is not necessary. It is sufficient that certain of the forms prescribed for adoption are gone through, with a view to prove unequivocally the intention of the adopter ... 199
38 One only destitute of a grandson and great-grandson, may adopt. 200
39 A leper cannot adopt ... 201
40 Unless he have performed the prescribed expiation ... 201
41 The simultaneous adoption of two sons, or the affiliation of one by a person who has a son (either his own issue, or adopted,) living, is now illegal, according to the concurrent testimony of the most approved authorities ... 201
42 A widow having an adopted son cannot without his consent alienate any portion of the estate which belonged to her husband ... 234

ADULTERY.

1 Divorce on account of adultery does not subject the woman to the loss of her peculiar property ... 126

ALIENATION.

1 Alienation, general rule as to, by a female ... 309
2 Question as to the widow's alienating in a certain case ... 310

ALIMONY.

1 There is no provision for alimony in the Hindu law, but only for maintenance ... 111
2 It was laid down by the *pundits*, that if the heirs of a person deceased neglect to assign to his widow a reasonable maintenance, the judge is at liberty to award a sum sufficient for that purpose ... 112

ANNAPRASANA.

1 Meaning of the term ... 159

APOSTACY.

1 In the case of apostacy from the Hindu faith, property acquired before the conversion will go to the

Digitized by Google

Hindu heirs, but that acquired subsequently will be distributed according to the law of the new religion ... 131
2 And a Moosulmaun widow of such apostate Hindu will have no right to his previously acquired property ... 132

ASCETIC.

1 To the property of an ascetic, his pupil or follower is heir, not his relations by blood ... 102
2 The debts of an ascetic follow his assets in the hands of his representatives ... 288

ASSETS.

1 The heirs who take the assets, are bound to discharge the debts of the deceased ... 277

BROTHERS.

1 In Bengal, a widow excludes a brother ... 18
2 Brothers exclude brothers' sons 22
3 Distribution of joint property, the claimants being a father, brother, widow, daughter, and daughter's son ... 23
4 Circumstances under which a widow excludes a brother ... 24
5 Distribution between a widow and her husband's brothers, the husband having died in the lifetime of his father ... 25
6 Half brothers share equally with whole brothers, if undivided ... 66
7 But are excluded by a whole brother, if separated ... 67
8 A brother inherits next to a mother ... 73
9 According to the best authorities of Hindu law, a brother's daughter's son has no right of succession... 77
10 The claimants to a joint estate being a widow, a son, and a brother, they will each take a third, to the exclusion of a daughter's son ... 79
11 A reunited brother entirely excludes an unassociated one ... 174

BROTHERS' SONS.

1 The claimants being a brother's son and a widow, the former will take the property, if the family was joint; but the latter if separate, according to the law of Benares ... 28
2 A brother's son excludes a brother's grandson ... 67
3 Ancestral property derived to a woman from her son, will at her death go to his half brother's son, to the exclusion of his sister ... 68
4 And sister's son ... 68
5 The claimants to property left by a widow, which had devolved on her at her husband's death, being her husband's brother's son and grandson, another brother's adopted son, and a third brother's four sons, the property will be made into eleven parts, of which the adopted son will take one, and the other brothers five sons two parts each. The grandson will be excluded. ... 70
6 The son of a reunited brother succeeds as heir, to the exclusion of all the sons of unassociated brethren. ... 72
7 On the death of a widow, her property will go to the sons of her husband's brother who survived, to the exclusion of the sons of his brother who died before her. ... 74
8 The adopted son of a brother excludes the son and grandson of an uncle. ... 74
9 Brother's sons, though separated, exclude a son's widow. ... 75
10 Brother's sons exclude the daughter of a daughter. ... 76
11 A sister is excluded by brother's sons. ... 80
12 A brother's son inherits, to the exclusion of a son's daughter's son..81

BROTHER'S WIDOW.

1 A brother's widow does not rank among heirs. ... 78
2 Of property assigned to their sister as maintenance by three brothers, one-third will on her death go to her brother's widow. ... 124
3 Reason of her succeeding in the instance cited. ... ib.

CIVIL DEATH.

1 Retirement from the world operates as natural death. ... 131

Digitized by Google

2 Retirement from the world is civil death, according to the Hindu law. ... 233

COUSIN.

1 The cousin on the father's side is the seventeenth in the order of succession. ... 191

CREDITORS.

1 The gift by a man of his whole property is unlawful and inoperative, as against a creditor. ... 248
2 A debtor may give evidence in favour of his creditor ... 318

DATTACA.

1 An only son cannot be adopted according to the *Dattaca* form ... 179
2 A woman cannot adopt a son *(Dattaca)* without the permission of her husband, nor can an only son or the eldest son be given in adoption. 182
3 A son given *(Dattaca)* cannot inherit his own father's property. ... 183

DAUGHTERS.

1 A daughter cannot claim succession while her mother lives. ... 25
2 Unless the mother do some act tending to defeat her right. ... *ib.*
3 A maiden excludes all married daughters. ... 39
4 Married daughters succeed to equal portions of an estate which had devolved on their mother at the death of their father, by reason of there being no male issue. ... 40
5 A daughter excludes a son's widow. ... 43
6 Of two daughters who succeeded jointly to the paternal property, one dying leaving sons, her share goes to her sister, provided that sister have or be likely to have a son; otherwise the son of the deceased daughter inherits. ... 44
7 Property which had devolved on a widow at her husband's death, goes, when she dies, to the son of her husband's paternal uncle, to the exclusion of her childless widowed daughter. ... 46
8 According to the law of Benares, a man's daughter, the family being joint, is only entitled to maintenance from her uncles and their sons, who succeed to her exclusion. ... 46
9 The claimants being a daughter or daughter's son and the widow of a daughter's son, the latter will be excluded, and the two first will inherit, in succession. ... 47
10 Ancestral property inherited by a daughter will at her death go to her father's relations, to the exclusion of her husband and daughter ... 57
11 A childless widowed daughter is excluded by a daughter who has male issue. ... 58
12 The daughter or her heir inherits the mother's peculiar property in preference to the son. ... 126
13 A daughter is not competent to alienate property which had devolved on her from her father to the prejudice of the next heir ... 224
14 Property which had devolved on a daughter, cannot by her be given to one son's son, to the exclusion of such grandson's brothers ... 232

DAUGHTER'S DAUGHTER.

1 There are not wanting authorities for the right of succession of a daughter's daughter; but this doctrine is nowhere respected ... 88

DAUGHTERS' SONS.

1 According to the law of Bengal, the heirs of three brothers, being respectively a son, a daughter's son, and a widow, they will each take a third. ... 4
2 Distribution of joint property, the claimants being a father, brother, widow, daughter, and daughter's son. ... 23
3 Of two daughters who succeeded jointly to the paternal property, one dying leaving sons, her share goes to her sister, provided that sister have, or be likely to have a son: otherwise the son of the deceased daughter inherits. ... 44

Digitized by Google

4 The claimants being a daughter or daughter's son, and the widow of a daughter's son, the latter will be excluded, and the two first will inherit in succession. ... 47
5 A daughter's son excludes a daughter, being a childless widow ... 49
6 A daughter's son excludes brothers' sons. ... 50
7 A daughter's son excludes a brother's widow and his son. ... 51
8 On the death of a widow, the property held by her goes to her husband's daughter's son, to the exclusion of her husband's brother's widow, but the latter is entitled to maintenance. ... *ib.*
9 Where the family is separated, the daughter's son takes the estate, to the exclusion of the uncle and uncle's son. ... 52
10 According to the best authorities of Hindu law, a brother's daughter's son has no right of succession... 77
11 Property devolved on a woman from her sons goes at her death to the son of her husband by another wife, and not to her daughter's sons. ... 125
12 The daughter's son inherits after the daughter. ... 186

DEATHBED.

1 The gift of a man's own acquisition is valid, though made on his deathbed, if he was of sound disposing mind at the time ... 246
2 To uphold a gift made on a deathbed, there should be the clearest proof of sound disposing mind, to repel any presumption which might exist to the contrary. ... *ib.*

DEBTOR—DEBTS.

1 The heirs who take the assets, are bound to discharge the debts of the deceased ... 277
2 The survivors are answerable for a debt contracted by their deceased partner, if the sum borrowed was applied to their use. ... 280
3 Brothers who took the estate are liable for the debts, as far as there may be assets, whether the money was borrowed by the deceased brother for his private use alone, or was expended for the benefit of the family at large ... 280
4 When a wife manages her husband's affairs, he is liable for the debts she contracts ... 281
5 The debts of a missing person must be paid by those in possession of his estate, without waiting twelve years for his re-appearance ... 282
6 The heir who takes the assets of a deceased debtor, must satisfy his creditors, as far as the assets go ... 283
7 Circumstances under which the husband's heirs are liable for a debt contracted by his widow ... *ib.*
8 The estate of a deceased surety, is not liable for the debts of his principal: but *quere?* ... 285
9 Circumstances under which a father must pay a debt contracted by his deceased son ... 286
10 Those who take the property of the deceased are bound to liquidate his debts ... 287
11 Neither the property nor person of a minor is liable for the debt of his ancestor ... *ib.*
12 The debts of an ascetic follow his assets in the hands of his representatives ... 288
13 Necessary debts contracted for an infant are binding on him ... 289
14 Joint property is answerable for a debt to the extent of the debtor's share only ... 294
15 A debtor may give evidence in favour of his creditor 318

DISTRIBUTION.

1 Distribution of joint property, the claimants being a father, brother, widow, daughter, and daughter's son ... 23
2 Distribution between a widow and her husband's brothers, the husband having died in the lifetime of his father ... 25

DIVORCE.

1 Divorce on account of adultery does not subject the woman to the loss of her peculiar property ... [illegible]

Digitized by Google

DONEE.—DONOR.

1 An action for dispossession will lie by a donee against the donor... 208
2 And a donee in actual possession is not accountable to a previous assignee ... *ib.*
3 A gift cannot be retained in the hands of the donor ... *ib.*

DWAMUSHYAYUNA.

See Adoption.

EMANCIPATION.

1 Cases in which the ruling power may compel emancipation ... 275

ENDOWMENTS.

1 The sale of endowed property is void ... 305

ESCHEATS.

1 An *acharjya* or spiritual teacher is ranked among the heirs according to the Hindu law, but not a *gooroo.* In default of heirs, the property of a person deceased escheats to the king, except he be of the *Brahminical* order ... 100

EVIDENCE.

1 A woman's assertion that she had been authorized by her late husband to adopt a son, is not sufficient proof ... 183
2 A slave may be witness against his master ... 317
3 But not for him ... *ib.*
3 The slaves of the plaintiff's relations are good witnesses ... 318
4 A debtor may give evidence in favour of his creditor ... *ib.*
5 A defendant cannot avail himself of the evidence of the plaintiff's female relations ... *ib.*
6 A confession, a denial, a special exception, and a plea of former judgment, are the four sets of answer ... *ib.*
7 In the case of a female, the evidence of a single female is admissible ... 319
8 A leper cannot be a witness ... *ib.*
9 A defendant's denial may be required on oath, in default of other evidence ... 320
10 Ordeals of any kind should not be resorted to, except on failure of all other evidence ... *ib.*

EXCLUSION FROM INHERITANCE.

1 A leper is incompetent to inherit ... 129
2 An insane person is excluded from inheritance; and on the death of his son, his wife will take the property, maintaining her husband and his mother ... 130
3 And a Moosulmaun widow of an apostate Hindu will have no right to his previously acquired property ... 132
4 An unchaste daughter is excluded from the inheritance ... 133
5 And the property will escheat, if there be no other heir ... *ib.*
6 Exclusion from inheritance. See note on ... *ib.*

FATHER.

1 But property acquired by a father is, on his death, inherited equally by all his sons, whether they aided in the acquisitions or not ... 7
2 Distribution of joint property, the claimants being a father, brother, widow, daughter, and daughter's son ... 23
3 Authority of, over the property patrimonial and acquired, and his right of resumption after partition... 114
4 The followers of the Benares school maintain that a father cannot make partition till his wife is past childbearing. See note ... 146
5 A father may resume property made over by him to his sons, should he subsequently become indigent ... 148
6 Those who take the property of the deceased are bound to liquidate his debts ... 287

GIFT.

1 Property having been assigned to a Brahmin for spiritual purposes,

Digitized by Google

cannot legally be given away without the assignee's consent ... 207
2 An action for dispossession will lie by a donee against the donor ... 208
3 A mother is not competent to make a gift to her daughter of a farm which she had inherited from her son, and on her death it will go to her sons' unassociated half brother ... 209
4 An ancestral landed estate cannot be given to one son, to the exclusion of the sons of another son... 210
5 The gift of joint property, to the extent of the donor's share, is valid (in Bengal) ... 212
6 The immoveable property given by a man to his grandson's wife is her peculiar property, over which she has absolute dominion ... 213
7 Landed property which a daughter obtains by a gift is hers absolutely; not so that which she acquires by inheritance ... 214
8 Personal property given by a husband to his wife on the occasion of contracting a second marriage, is hers absolutely; not so real property, over which the husband's right endures, notwithstanding the gift ... 215
9 A gift of personal property inherited by a widow, to her daughter's husband, is good though the daughter be living. ... 217
10 A gift by a woman of her own property to a stranger is good, if she have no heirs. ... *ib.*
11 A gift conditioned to take effect after the death of the donor, does not go to the heir of the donee, if the latter died before the former, unless expressly stipulated ... 218
12 Circumstances under which a gift is invalidated ... *ib.*
13 A death-bed gift is valid ... 219
14 Circumstances under which a gift is rendered void ... *ib.*
15 The gift by a coparcener of her share of the joint estate is valid, according to the law of Bengal ... 220
16 The gift of part or the whole of landed property purchased with the produce of an ancestral estate is good and valid ... 221
17 According to the law of Bengal, a person may dispose of his entire portion of ancestral property, to the exclusion of his wife and daughters. ... 222
18 A conditional gift is rendered null and void by the omission of the donee to perform all the conditions stipulated by the donor. ... 223
19 A deed of gift executed on a death-bed is valid. ... *ib.*
20 According to the law as current in Tirhoot, a gift of joint property is invalid ... 224
21 And *Birt* profits are unalienable. ... 225
22 A man may give all his property to his two wives in unequal allotments, provided they each have enough for maintenance, and he have no other heirs. ... 226
23 According to the law of Bengal, a gift of the entire property, moveable and immoveable, to a married daughter is legal, even though a wife and maiden daughter are in existence. ... 227
24 But he acts sinfully if he does so. ... 227
25 The whole estate may be given away, though there is a sister and sister's son. ... 229
26 A verbal gift of property by an unassociated Hindu, on condition that the donee will perform his exequial rites, is good, on the death of the donor. .. 230
27 To the exclusion of the brothers of the donor. ... 231
28 A plaintiff may make a gift of the property he is suing for, and the guardian of the donee is thereby empowered to carry on the suit. *ib.*
29 Property which had devolved on a daughter, cannot by her be given to one son's son, to the exclusion of such grandson's brothers ... 232
30 Though his sister be living, a man may give away all his property to a stranger. ... *ib.*
31 Landed property acquired by gift from her father may be alienated by a woman, but not that to which she had succeeded by inheritance... 235
32 According to the law of Bengal, a

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father may give all his self-acquired landed property to one of his sons. ... 237
33 A gift may be taken back, on the donee's violation of the conditions annexed. ... *ib.*
34 Resumption of an unqualified gift unlawful. ... 238
35 A widow in Bengal may, with the recorded permission of her husband, alienate his immoveable self-acquired property, although his brother is living. ... *ib.*
36 A woman may dispose of, at her pleasure, landed property acquired by gift from her father. ... 239
37 A widow may dispose of, by gift or otherwise, as she pleases, the property earned by her own exertions. ... 240
38 The concubine of a *Byragee* may dispose of, at her pleasure, property given to her by him, though he have an illegitimate son, who would otherwise have been sole heir. ... 241
39 A man may give his whole property to one daughter, to the exclusion of his wife and another daughter. ... 243
40 A gift to a minor is valid, provided on his coming of age he exercise ownership over it. ... *ib.*
41 A man, without the consent of his sons, may give a small portion of his property to his daughter's sons. 244
42 A widow may, for the spiritual benefit of her deceased husband, make a gift of a small portion of his estate, to her own relation. ... *ib.*
43 Property may be given to a brother's daughter's son, to the exclusion of a sister's son; though, according to the law of inheritance, the latter would exclude the former. ... 245
44 The gift of a man's own acquisition is valid, though made on his death-bed, if he was of sound disposing mind at the time. ... 246
45 To uphold a gift made on a death-bed, there should be the clearest proof of sound disposing mind, to repel any presumption which might exist to the contrary. ... *ib.*
46 A widow, having received instructions from her husband to adopt a son, and without doing so, making a gift to a stranger of the property which had devolved on her at her husband's death, such gift is invalid. ... 247
47 The gift by a man of his whole property is unlawful and inoperative, as against a creditor. ... 248
48 A gift once made cannot be resumed at the pleasure of the donor. ... 250
49 A gift by a father of his entire property to one daughter, is legal, though he may have another daughter and brother's son. ... 251
50 The other daughter, if unmarried, is entitled to have the expenses of her nuptials defrayed ... 252
51 The gift of a paternal estate is valid without the consent of sisters' sons. ... *ib.*
52 A man cannot make a gift of his property to a daughter's son, to the exclusion of the adopted son of an unseparated brother. ... 253
53 A person having a son may make a gift of his maternal grandfather's landed property which had been usurped, on condition of the donee's recovering it. ... 255
54 A man may give his entire property to the husband of one of the daughters of his deceased son as a *Yautuca*, or nuptial present, to the exclusion of his son's widow and other daughters. ... 263

GRANDMOTHERS.

1 A paternal grandmother excludes a sister and uncles. ... 64
2 Notwithstanding the preference assigned to the paternal uncle in the commentary on the *Dáyabhága*. 65
3 The claimants being a childless sister, a paternal grandmother, and paternal uncles; the grandmother is the heir. ... 97
4 Property inherited by a grandmother goes on her death to her husband's son, to the exclusion of his brother's son. ... 124
5 Property devolving on a grand-

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mother by right of inheritance is not her *peculium* or *stridhun*. 125

GRANDSONS.

1 The eldest son is not entitled to a larger share in right of primogeniture. ... 1
2 A son's son shares equally with sons ... 8
3 Sons' sons whose fathers are missing, inherit equally with sons ... 8
4 Grandsons in the male line whose father is dead, and great-grandsons whose father and grandfather are dead, share with sons, and inherit *per stirpes* not *per capita*. ... 10
5 Property having been given by a man to his four grandsons, and one of them dying, the son of the deceased is entitled to claim partition from his uncles. ... 150
6 An ancestral landed estate cannot be given to one son, to the exclusion of the sons of another son. ... 210

GUARDIAN.

1 Order of relations entitled to dispose of a minor in marriage ... 204
2 The father cannot act as guardian to a minor widow, while her husband's sister's son is living ... *ib.*
3 The mother is entitled to the guardianship of her minor children, in preference to their uncles ... 205

HALF BROTHER.

1 Half brothers share equally with whole brothers, if undivided ... 66
2 But are excluded by a whole brother, if separated ... 67

HALF SISTER.

1 The son of a half sister succeeds to property jointly with the son of a whole sister ... 86

HUSBAND.

1 When a wife manages her husband's affairs, he is liable for the debts she contracts ... 281

ILLEGITIMATE SON.

1 The son of a *Sdura* by a female slave will inherit, if there be no other heirs down to a daughter's son. 15
2 According to the Hindu law, the illegitimate son of a *Sudra* man by a female slave or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes ... 15
3 The illegitimate son of a person belonging to one of the regenerate tribes is entitled to maintenance only ... 119
4 The son of a *Sudra* by a concubine or female slave is entitled to inherit property, but his widow is incompetent to aliene to the prejudice of other heirs ... 256

INHERITANCE.

1 The eldest son is not entitled to a larger share in right of primogeniture ... 1
2 And the issue of a younger share equally with the issue of an elder son ... 2
3 The heirs being three sons and a widow, (their mother,) each will take a fourth on partition ... 3
4 According to the law of Bengal, the heirs of three brothers being respectively a son, a daughter's son, and a widow, they will each take a third ... 4
5 One of three sons having separated himself from the family, and taken a share during his father's lifetime, has no further claim on the estate. 5
6 But mere living apart does not exclude ... 5
7 Sons share equally ... 6
8 A Son's son shares equally with sons ... 8
9 Sons' sons whose fathers are missing inherit equally with sons ... *ib.*
10 Grandsons in the male line whose father is dead, and great-grandsons whose father and grandfather are dead, share with sons, and inherit *per stirpes* not *per capita* ... 10
11 The right of representation descends lineally only, and does not extend collaterally ... 12
12 Sons legally separated from their father have not, on his death, any claim to inherit with a son not separated. 16
13 A widow succeeds to her hus

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band's property, to the exclusion of his mother ... 18
14 In Bengal, a widow excludes a brother ... *ib.*
15 A daughter cannot claim succession while her mother lives ... 25
16 Unless the mother do some act tending to defeat her right ... *ib.*
17 The claimants being a brother's son and a widow, the former will take the property, if the family was joint; but the latter if separate, according to the law of Benares ... 28
18 A widow cannot inherit property left by her husband's relatives or their widows ... 29
19 Case in which the widows of two brothers inherit equal shares of property ... 32
20 A man dying and leaving three widows, who inherited his property, on the death of one of them without issue, the two others will take her share ... 37
21 A daughter excludes a son's widow ... 43
22 Of two daughters who succeeded jointly to the paternal property, one dying leaving sons, her share goes to her sister, provided that sister have or be likely to have a son: otherwise the son of the deceased daughter inherits ... 44
23 Property which had devolved on a widow at her husband's death goes when she dies, to the son of her husband's paternal uncle, to the exclusion of her childless widowed daughter ... 46
24 According to the law of Benares, a man's daughter, the family being joint, is only entitled to maintenance from her uncles and their sons, who succeed to her exclusion ... 47
25 The claimants being a daughter or daughter's son, and the widow of a daughter's son, the latter will be excluded, and the two first will inherit, in succession ... *ib.*
26 According to the law of Benares the undivided brother's female heirs are excluded by his male coparceners ... *ib.*
27 A daughter's son excludes a daughter, being a childless widow ... 49
28 A daughter's son excludes brother's sons ... 50
29 A daughter's son excludes a brother's widow and his son ... 51
30 On the death of a widow, the property held by her goes to her husband's daughter's son, to the exclusion of her husband's brother's widow, but the latter is entitled to maintenance ... *ib.*
31 Where the family is separated, the daughter's son takes the estate, to the exclusion of the uncle and uncle's son ... 52
32 According to the law of Bengal the father is preferred to the mother in the order of succession; but it is *vice versâ* elsewhere. Authorities cited ... 54
33 Ancestral property inherited by a daughter will at her death go to her father's relations, to the exclusion of her husband and daughter ... 57
34 A man cannot claim his maternal grandfather's property, while his mother is living ... *ib.*
35 A childless widowed daughter is excluded by a daughter who has male issue ... 58
36 In Bengal, a mother inherits joint property to the exclusion of a paternal uncle ... 59
37 And divided property universally. 60
38 In succession to her son, who shared his grandfather's estate equally with his uncle ... 61
39 A step-mother has no right of succession according to the law of Bengal, and the property of her step-son will rather go to his uncle's adopted son. ... 62
40 A paternal grandmother excludes a sister and uncles. ... 64
41 A mother is entitled to a share equal to that of one of her sons, and she may give that share to her only son. See note. ... 65
42 Half brothers share equally with whole brothers, if undivided. ... 66
43 But are excluded by a whole brother, if separated. ... 67
44 A brother's son excludes a brother's grandson. ... *ib.*

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45 Ancestral property derived to a woman from her son, will at her death go to his half brother's son, to the exclusion of his sister. ... 68
46 And sister's son. ... *ib.*
47 Property derived to a woman from her husband goes at her death to his nephews; but not her peculiar property, which will go, in preference, to her step-daughter. ... 69
48 The claimants to property left by a widow, which had devolved on her at her husband's death, being her husband's brother's son and grandson, another brother's adopted son, and a third brother's four sons, the property will be made into eleven parts, of which the adopted son will take one, and the other brother's five sons two parts each. The grandson will be excluded. ... 70
49 The son of a reunited brother succeeds as heir, to the exclusion of all the sons of unassociated brethren. ... 72
50 A brother inherits next to a mother. ... 73
51 On the death of a widow, her property will go to the sons of her husband's brother who survived, to the exclusion of the sons of his brother who died before her. ... 74
52 The adopted son of a brother excludes the son and grandson of an uncle. ... *ib.*
53 Brothers' sons, though separated, exclude a son's widow. ... 75
54 Brothers' sons exclude the daughter of a daughter. ... 76
55 According to the best authorities of Hindu law, a brother's daughter's son has no right of succession... 77
56 A brother's widow does not rank among heirs. ... 78
57 The claimants to a joint estate being a widow, a son, and a brother, they will each take a third, to the exclusion of a daughter's son ... 79
58 A sister is excluded by brothers' sons. ... 80
59 If a title is once vested in a male heir, it cannot be lost again by any supervenient disqualification ... *ib.*
60 A brother's son inherits, to the exclusion of a son's daughter's son.81
61 Fathers' daughters' sons are the legal heirs, on failure of brothers' sons. ... 82
62 A sister's son excludes a step-mother and paternal uncles ... 84
63 Sisters have no right of inheritance, but their sons exclude the paternal uncle's son's son. ... 85
64 Unless the contrary should have been the invariable usage ... 81
65 The son of a half sister succeeds to property jointly with the son of a whole sister. ... *ib.*
66 According to the law as current in Bengal, a sister's son excludes a paternal uncle's grandson. ... 87
67 The exclusion of the sister's son is conformable to the law as current in Mithila, Benares, and other provinces, as the followers of those schools do not rank the sister's son among the series of heirs enumerated in the text of *Yájnyawalcya;* but it is contrary to the doctrine prevalent in Bengal. ... *ib.*
68 The sister's son excludes the daughter of a daughter. ... 88
69 In Bengal, the adopted son of a sister takes a seventh as co-heir with three sons of another sister ... 89
70 A sister's son excludes paternal grand-uncles' descendants ... *ib.*
71 A sister's son excludes a descendant in the male line of the great-grandfather. ... 90
72 According to the law of inheritance as current in Bengal, the father's sister's son is the eighteenth in the order of succession; but according to the law as current in Mithila and Benares, he is not entitled to the inheritance so long as there is a *gotraja* or gentile, which term includes all those descended from the same primitive stock, as far as the fourteenth generation. ... 92
73 The maternal uncle's son is heir after the mother's sister's son, according to the *Mitácshará* and according to *Sricrishna's* commentary on the *Dáyabhága;* but according to the *Dáyacramasangraha* and other Bengal authorities he ranks immediately after the maternal uncle. 95
74 The claimants being a childless sis-

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ter, a paternal grandmother, and paternal uncles; the grandmother is the heir. ... 97
75 And failing the paternal grandmother, the paternal uncles succeed; but their property is divested, should the sister subsequently have male issue. 99
76 An *acharjya* or spiritual teacher is ranked among the heirs according to the Hindu law, but not a *gooroo*. In default of heirs, the property of a person deceased escheats to the king, except he be of the *Brahminical* order. ... 100
77 A fellow disciple is by general usage allowed to be heir, in default of nearer claimants. ... 101
78 To the property of an ascetic, his pupil or follower is heir, not his relations by blood. ... 102
79 The heirs of the founder have a common right to the use of a building relinquished by him for a place of worship: not so the heirs of the *Purohit*, or spiritual preceptor of the founder. ... *ib.*
80 A woman cannot inherit immediately from her father-in-law ... 104
81 The widow of a son is excluded by a brother's sons, but she must be maintained by them. ... *ib.*
82 An adopted son's widow takes the property of his adopting mother, to the exclusion of such adopting mother's daughter and her sons ... 105
83 Even though the adopted son should not have taken possession before his death. ... 106
84 A son's widow has no legal claim of inheritance. ... *ib.*
85 And is excluded by her husband's sister's sons. ... 107
86 But his sister cannot inherit, except through her sons as mother. *ib.*
87 Sons' widows have the right of succession according to one authority; but the doctrine is not generally received. ... 108
88 A woman cannot inherit immediately from her step-son, but she is entitled to maintenance from his heir. ... 117
89 A woman's property goes to her sons, to the exclusion of her grandson, whose father died before her ... 121
90 A widow cannot dispose of the whole estate which had devolved on her at her husband's death; and on the death of her daughter who succeeded her, it will go to her paternal grandfather's daughter's son, to the exclusion of her husband. ... 123
91 Of property assigned to their sister as maintenance by three brothers, one-third will on her death go to her brother's widow. ... 124
92 Property inherited by a grandmother, goes on her death to her husband's daughter's son, to the exclusion of his brother's son. 103
93 Property devolved on a woman from her sons, goes at her death to the son of her husband by another wife, and not to her daughter's sons ... 125
94 A posthumous son is entitled to inherit his grandfather's property with his uncle's, but not a posthumous daughter, who can only take property actually in the possession of her father before his death. 176
95 An adopted son, sharing with a son of the body, is entitled to a fourth ... 184
96 The daughter's son inherits after the daughter ... 186
97 Ancestral property which had devolved on a daughter will not at her death go to her adopted son, but to the heirs of her father ... 188
98 The cousin of her husband, that is to say, the son of his father's brother, is heir on the death of the widow, to the ancestral estate which had devolved on her, provided there be no nearer relation of the husband ... 190
99 Authority for the above opinion ... 191
100 According to the law of Benares, a widow has no right of succession to the undivided property of her deceased husband ... 192
101 The nearest heir of her husband will succeed to the estate of a widow which had devolved on her at her husband's death ... 194
102 The whole estate may be given away, though there is a sister and

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sister's son. The sister has no right of inheritance, but her son will inherit in default of heirs down to the brother's grandson ... 229
103 *Stridhun* will be inherited by the woman's brother or brother's son, to the exclusion of her husband's heirs ... 262

INSANITY.

1 An insane person is excluded from inheritance; and on the death of his son, his wife will take the property, maintaining her husband and his mother ... 130
2 Sale by a wife of her insane husband's estate, when valid ... 311

JOINT PROPERTY.

1 Joint property is answerable for a debt to the extent of the debtor's share only ... 294
2 The consent of all the partners is requisite to the sale of a joint estate, even though the name of one only may have been recorded as proprietor ... 296

KURTA POOTRA.

1 A widow (inhabitant of Tirhoot) may adopt a *Curta Pootra* or *Critrima* son without her husband's permission ... 195
2 A son of a brother may be taken as a *Critrima* son ... 197
3 Even though he be an only son *ib.*

LEPERS.

1 A leper is incompetent to inherit ... 129
2 A leper cannot adopt ... 201
3 Unless he have performed the prescribed expiation ... *ib.*
4 A leper cannot be a witness ... 319

LIMITATION.

1 The proprietary right to moveable property lapses after a period of ten years, provided there was wilful neglect on the part of the owner for that period; but not if his non-interference was unavoidable ... 269

MAIDEN.

1 A maiden excludes all married daughters ... 39

MAINTENANCE.

1 A widow is entitled to maintenance from her step-sons ... 31
2 A husband expelling his wife without sufficient cause is bound to maintain her ... 109
3 By voluntary desertion of her husband the wife loses her right to maintenance ... 110
4 But an expelled wife is not entitled to demand a share of her husband's property ... *ib.*
5 There is no provision for alimony in the Hindu law, but only for maintenance ... 111
6 An unchaste widow is not entitled to maintenance from her husband's brothers, even though she may have resigned her right to his property in their favour, in consideration of such maintenance ... 112
7 It was laid down by the *pundits*, that if the heirs of a person deceased neglect to assign to his widow a reasonable maintenance, the judge is at liberty to award a sum sufficient for that purpose ... *ib.*
8 Sons are bound to maintain their parents ... 113
9 According to the law as current in Benares, the widow of a nephew is entitled to maintenance only from his uncles with whom he was in partnership ... 116
10 A widow whose husband died before his father has a legal claim to maintenance only ... *ib.*
11 A woman cannot inherit immediately from her step-son, but she is entitled to maintenance from his heir ... 117
12 A son, on succeeding to his father's estate must maintain his step-mother and her daughters ... 118
13 The widow of a separated brother is not entitled to maintenance from her late husband's family ... 119
14 The illegitimate son of a person belonging to one of the regenerate tribes is entitled to maintenance only ... *ib.*

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15 The sale by a widow of her husband's landed property is valid, if necessary to her maintenance... 304

MANAGEMENT.

1 Management of the estate does not necessarily vest in the eldest brother ... 149
2 The management of an estate which has devolved on a minor widow rests with her husband's relations, and with her own relations only in their default ... 203

MARRIED DAUGHTERS.

1 Married daughters succeed to equal portions of an estate which had devolved on their mother at the death of their father, by reason of there being no male issue ... 40

MARRIAGE.

1 Order of relations entitled to dispose of a minor in marriage ... 204

MASTER.

1 Penalty in case the master exceeds his power ... 275

MATERNAL UNCLE'S SONS.

1 The maternal uncle's son is heir after the mother's sister's sons, according to the *Mitácshraá*, and according to *Sricrishna's* commentary on the *Dáyabhága;* but according to the *Dáyacramasangraha* and other Bengal authorities, he ranks immediately after the maternal uncle ... 95
2 Difference of opinion as to his place in the order of succession ... 97

MINORITY.

1 The management of an estate which has devolved on a minor widow rests with her husband's relations, and with her own relations only in their default ... 20
2 Order of relations entitled to dispose of a minor in marriage. ... 204
3 The father cannot act as guardian to a minor widow, while her husband's sister's son is living. ... *ib.*
4 The mother is entitled to the guardianship of her minor children, in preference to their uncles. ... 205
5 Minority extends to the end of fifteen years. ... 220
6 According to some Hindu legislators, minority continues until after completion of the age of fifteen years, and others state sixteen as the term. ... 288
7 At the expiration of the term of minority, the son and son's son of a person deceased are bound to discharge the obligations of their ancestor. ... *ib.*
8 The brothers of a minor are not competent to sell his share of the joint estate, even though the mother be consenting thereto. ... 294
9 Circumstances under which a sale of the paternal estate by the eldest son during the minority of his brothers is valid. ... 294
10 Sale by a minor of his landed property is void. ... 305

MINORS.

1 A minor son is not entitled to claim possession of his share of the joint property which is in the hands of his brothers. ... 13
2 A minor may sue for partition through his guardian. ... 14
3 Neither the property nor person of a minor is liable for the debt of his ancestor. ... 287

MISSING PERSONS.

1 Sons' sons whose fathers are missing, inherit equally with sons. ... 8
2 Time allowed for re-appearance of. ... 9
3 A woman has no claim to her missing husband's share of his father's property, ... 26
4 The time allowed for the re-appearance of a missing person is 12 years, after which his death is to be presumed. ... *ib.*
5 The wife of a person who has been missing for fifty-five years has no right to claim his share of the joint

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property, according to the law of Benares. ... 27
6 But has a right according to the law of Bengal. ... 28
7 The debts of a missing person must be paid by those in possession of his estate, without waiting twelve years for his re-appearance. ... 282

MORTGAGE.

1 Where a person mortgages his property for a valuable consideration to one person, and mortgages the same property to another, the first mortgage shall hold good; but in a case where a man mortgages his property, and subsequently makes a sale of the same property, the latest contract will have superior force, on the satisfaction of the debt for which the property was mortgaged. ... 303
2 Mortgaged property cannot be alienated by the mortgagor, except under certain conditions. ... 307

MOTHERS.

1 A widow succeeds to her husband's property, to the exclusion of his mother. ... 18
2 A man cannot claim his maternal grandfather's property, while his mother is living. ... 57
3 In Bengal, a mother inherits joint property, to the exclusion of a paternal uncle. ... 59
4 And divided property universally. ... 60
5 In succession to her son, who shared his grandfather's estate equally with his uncle. ... 61
6 A step-mother has no right of succession according to the law of Bengal, and the property of her step-son will rather go to his uncle's adopted son. ... 62
7 In Benares, a step-mother shares on partition. ... 64
8 A mother is entitled to a share equal to that of one of her sons, and she may give that share to her only son. See note. ... 65
9 Share of on a partition by her son. *ib.*
10 May compel her sons to come to a partition. ... *ib.*

OBLIGATIONS.

1 Certain descriptions of women competent to contract obligations for which their husbands are answerable. ... 278
2 Colebrooke cited. ... 279

ORDEALS.

1 Ordeals of any kind should not be resorted to, except on failure of all other evidence. ... 320

PARENTS.

1 According to the law of Bengal, the father is preferred to the mother in the order of succession, but it is *vice versâ* elsewhere. Authorities cited. ... 54
2 Sons are bound to maintain their parents. ... 113

PARTITION.

1 A minor may sue for partition through his guardian. ... 14
2 Of ancestral property, not legal while the mother is capable of bearing children. ... 32
3 Mother's share on a partition by her sons. ... 65
4 Mother may compel her sons to come to a partition. ... *ib.*
5 If the father's daughters' sons make partition of their maternal uncle's estate while one of them is capable of bearing more children, and subsequently to the partition a son be born, he should have an equal share of the inheritance. ... 83
6 A father making a partition among his sons must reserve his legal share, his wife not being past child-bearing. ... 145
7 The father's choice alone determines the time of making a partition of his own acquired wealth. ... 146
8 The followers of the Benares school maintain, that the father is subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predeces-

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sor, and cannot make partition till his wife is past child-bearing. ... 46
9 An unequal distribution made by a father among his sons of self-acquired or moveable property is valid. ... 140
10 Had it occurred elsewhere, the opinion would have been different, the law of Benares and other schools not admitting an unequal distribution of real property, though acquired by the father himself. ... *ib.*
11 Partition without the father's consent is illegal. ... 148
12 But with his consent, binds him, though absent at the time. ... 149
13 And without his consent does not bind the son who made it. ... 150
14 Property having been given by a man to his four grandsons, and one of them dying, the son of the deceased is entitled to claim partition from his uncles. ... *ib.*
15 One-fourth, over and above his own share of a recovered family estate, goes on partition to him who recovered it. ... 158
16 The acquirer takes a double share on partition, where ancestral property has been used in making the acquisition. ... *ib.*
17 Land purchased for a boy by means of his *Yautuca*, is not liable to partition. ... 159
18 The acquisition of a man made by his own means alone is not divisible among his brothers. ... 161
19 Acquisitions made by a man jointly with his brother's four sons, by means of joint funds, will be divided into two portions, of which one will be taken by the man himself, and the other be shared equally by the four sons of his brother ... 162
20 Property acquired by one of four brothers with the aid of his father's funds and labour, will on partition be made into ten parts, of which five will go to the father, two to the acquirer, and one to each of his brothers: if acquired without any aid, into two parts, the father taking one, and the acquirer one ... 164
21 The son of one of five brothers, though his father was insane, is entitled, on partition, to one-fifth of property acquired by joint funds. ... 165
22 The fact of a partition should be recorded. ... 168
23 Partition cannot be set aside on the ground of there being no document forthcoming ... *ib.*
24 Partition will be presumed under what circumstances. ... 169
25 Partition, what constitutes evidence of. ... 170

PARTNERSHIP.

1 Property acquired without using the patrimony by one brother living in partnership, belongs to him exclusively. ... 33

PRE-EMPTION.

1 Right of pre-emption recognized in joint property. ... 297
2 According to the Hindu law, there is no right of pre-emption, either in the schools of Bengal, Benares, or Mithila; but the two latter forbid the sale of undivided property. *ib.*
3 There is no right of pre-emption according to the law of Bengal ... 298

PRESCRIPTION.

1 Prescription is no bar to partition after any length of time, as far as the fourth in descent. ... 152

PRIESTS.

1 Designation of those who attend at funerals. ... 225

PRIMOGENITURE.

1 The eldest son is not entitled to a larger share in right of primogeniture. ... 1
2 And the issue of a younger share equally with the issue of an elder son. ... 2
3 Primogeniture confers a right, if sanctioned by peculiar usage. ... 17

PRIORITY.

1 Prior gift invalidates subsequent sale after the lapse of fifteen years... 315

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REPRESENTATION.

1 The right of representation descends lineally only, and does not extend collaterally. ... 12

RESUMPTION.

1 A father may resume property made over by him to his sons, should he subsequently become indigent... 148
2 A gift may be taken back, on the donee's violation of the conditions annexed. ... 237
3 Resumption of an unqualified gift unlawful. ... 238

REUNION.

1 The son of a reunited brother succeeds as heir, to the exclusion of all the sons of unassociated brethren. 72
2 If reunion be pleaded after partition, there must be distinct evidence to the fact. ... 173
3 Meaning of the term according to Jugunnatha. ... *ib.*
4 A reunited brother entirely excludes an unassociated one. ... 174

SALE.

1 According to the law of Bengal, unseparated coheirs may sell their own portions of an ancestral estate. ... 291
2 Authority cited in proof of a single coheir's right to dispose of his own portion of joint property, according to the law of Bengal ... 292
3 Sale by a widow of landed property is good, if necessary for the support of the family. ... 293
4 The brothers of a minor are not competent to sell his share of the joint estate, even though the mother be consenting thereto. ... 294
5 The consent of all the partners is requisite to the sale of a joint estate, even though the name of one only may have been recorded as proprietor. ... 296
6 Circumstances under which a sale of the paternal estate by the eldest son during the minority of his brothers is valid. ... 297
7 Sale by a widow without the consent of the next heirs, of any part of the property devolved on her from her husband is invalid, except under special circumstances ... 299
8 The sale by the managing partner of an entire estate is valid in a case of necessity. ... 301
9 A sale of mortgaged property is valid, and becomes complete on discharging the incumbrance. ... 303
10 The sale by a widow of her husband's landed property is valid, if necessary to her maintenance ... 304
11 The sale by a slave of his own issue is void. ... 305
12 Sale by a minor of his landed property is void. ... 305
13 The sale of endowed property is void. ... *ib.*
14 According to the law as current in Orissa, the sale of a portion of joint property is void. ... 306
15 According to the authorities as current in Bengal, the sale of joint immoveable property by one of the parceners, to the amount of the seller's share, is not forbidden; and if he sell the whole estate, the sale is not valid, so far as regards the shares of his other partners, but is valid so far as regards his own share. ... *ib.*
16 Authorities cited. ... *ib.*
17 Sons are not at liberty to sell their mother's portion. ... 309
18 Sale by a widow with consent of next heir is valid. ... *ib.*
19 A sale by one partner of an undivided estate, if justified by necessity, is good and binding upon the other partners. ... 311
20 Sale by a wife of her insane husband's estate when valid. ... *ib.*
21 Sale of a man's entire property allowable under what circumstances. ... 312
22 Circumstances under which three brothers can effect the sale of an estate without the consent of the widow of a fourth brother ... 113
23 According to the law of Bengal, the sale by one parcener of his own undefined share of an estate is good and valid. ... *ib.*

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24 Prior gift invalidates subsequent sale after the lapse of 15 years. 315

SEPARATION.

1 One of three sons having separated himself from the family, and taken a share during his father's lifetime, has no further claim on the estate. ... 5
2 But mere living apart does not exclude. ... 5
3 Sons legally separated from their father have not, on his death, any claim to inherit with a son not separated. ... 16
4 Living apart as to food and habitation, is not considered a separation such as to disqualify from inheritance. ... 172

SISTERS.

1 A sister is excluded by brother's sons. ... 80
2 Sisters have no right of inheritance, but their sons exclude the paternal uncle's son's son. ... 85
3 Unless the contrary should have been the invariable usage. ... 86
4 A sister cannot inherit, except through her sons, as mother. ... 107
5 The whole estate may be given away, though there is a sister and sister's son. ... 229
6 The sister has no right of inheritance, but her son will inherit in default of heirs down to the brother's grandson. ... *ib.*

SISTER'S GRANDSON.

1 A sisters' grandson is not an heir. ... 91

SISTER'S SONS.

1 Fathers' daughters' sons are the legal heirs, on failure of brother's sons. ... 82
2 A sister's son excludes a step-mother and paternal uncles. ... 84
3 Sisters have no right of inheritance, but their sons exclude the paternal uncle's son's son. ... 85
4 The sister's son does not inherit according to the law of Benares ... *ib.*
5 Unless the contrary should have been the invariable usage. ... 86
6 The son of a half sister succeeds to property jointly with the son of a whole sister. ... *ib.*
7 According to the law as current in Bengal, a sister's son excludes a paternal uncle's grandson. ... 87
8 The sister's son excludes the daughter of a daughter. ... 88
9 In Bengal the adopted son of a sister takes a seventh, as co-heir with three sons of another sister. 89
10 A sister's son excludes paternal grand-uncles' descendants. ... *ib.*
11 A sister's son excludes a descendant in the male line of the great-grandfather. ... 98
12 According to the law of inheritance as current in Bengal, the father's sister's son is the eighteenth in the order of succession; but according to the law as current in Mithila and Benares, he is not entitled to the inheritance so long as there is a *gotraja* or gentile, which term includes all those descended from the same primitive stock, as far as the fourteenth generation. ... 92

SLAVERY—SLAVES.

1 Son of, by a *súdra*, under what circumstances entitled to inherit... 15
2 Slaves are of fifteen descriptions. Enumeration of them. ... 265
3 One of two owners of a female slave giving her away in marriage, the other still retains his right to half her labour, or half her value ... 266
4 The emancipation of a slave by one of three masters, does not render him free with respect to the other two. ... 267
5 Children sold as slaves, are not entitled to their freedom on coming of age. ... *ib.*
6 A free woman, by marrying a slave, becomes the slave of her husband's master. ... 268
7 And on the death of her husband, may be sold by his master. ... *ib.*
8 The property in a slave is lost by neglecting to claim him for more than twelve years. ... 269

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9 Four sorts of slaves cannot effect their own emancipation. ... 270
10 But they should not be consigned to misery by sale. ... *ib.*
11 Under what circumstances slaves are not transferrable to another master. ... 272
12 Enumeration of the fifteen descriptions of. ... 273
13 Duties to be performed by slaves, and penalties for omitting them. 274
14 Penalty in case the master exceeds his power. ... 275
15 Cases in which the ruling power may compel emancipation. ... *ib.*
16 A slave may be witness against his master. ... 317

SONS.

1 The eldest son is not entitled to a larger share in right of primogeniture. ... 1
2 The heirs being three sons and a widow, (their mother,) each will take a fourth on partition. ... 3
3 According to the law of Bengal, the heirs of three brothers, being respectively a son, a daughter's son, and a widow, they will each take a third. ... 4
4 Sons share equally. ... 6
5 A son's son shares equally with sons. ... 8
6 An insane and dumb son is excluded from the inheritance, and the daughter will succeed. ... 42
7 The claimants to a joint estate being a widow, a son, and a brother, they will each take a third, to the exclusion of a daughter's son. ... 79
8 A posthumous son is entitled to inherit his grandfather's property with his uncle's, but not a posthumous daughter, who can only take property actually in the possession of her father before his death. ... 176
9 An ancestral landed estate cannot be given to one son, to the exclusion of the sons of another son ... 210
10 Without the consent of his legitimate son, a man cannot alienate any part of his immoveable property according to the law as current in Benares. ... 233

SON'S WIDOW.

1 A daughter excludes a son's widow. ... 43
2 A woman cannot inherit immediately from her father-in-law... 104
3 The widow of a son is excluded by a brother's sons, but she must be maintained by them. ... *ib.*
4 A son's widow has no legal claim of inheritance. ... 106
5 And is excluded by her husband's sister's sons. ... 107
6 A son's widow has the right of succession according to one authority; but the doctrine is not generally received. ... 108

STEP-MOTHER.

1 A step-mother has no right of succession according to the law of Bengal, and the property of her step-son will rather go to his uncle's adopted son. ... 62
2 A son, on succeeding to his father's estate, must maintain his step-mother, and her daughters. ... 118

STRIDHUN.

1 That which is given by a husband to his wife, is termed her *Stridhun*, or peculiar property. ... 35
2 But if such property given to her by her *husband* be *immoveable*, she has no right to dispose of it. *ib.*
3 On her death it goes to her heirs in preference to the heirs of her husband. ... *ib.*
4 Property derived to a woman from her husband, goes, at her death, to his nephews; but not her peculiar property, which will go, in preference to her step-daughter. ... 69
5 A woman's property goes to her sons, to the exclusion of her grandson, whose father died before her 121
6 Personal property given to a woman at the time of her marriage, becomes hers exclusively ... 122
7 The daughter or her heir inherits the mother's peculiar property, in preference to the son ... 126
8 The immoveable property given by

a man to his grandson's wife, is her peculiar property, over which she has absolute dominion ... 213
9 Landed property which a daughter obtains by a gift, is hers absolutely; not so that which she acquires by inheritance ... 214
10 Personal property given by a husband to his wife on the occasion of contracting a second marriage, is hers absolutely; not so real property, over which the husband's right endures, notwithstanding the gift ... 215
11 Property personally acquired by a woman does not, strictly speaking, fall under any one of the six descriptions of *stridhun* or *peculium*, as enumerated by *Yájnyawalcya*, or *Jimutavahana*, inasmuch as it is admitted that the husband's dominion extends over the earnings of her industry ... 241
12 *Stridhun* will be inherited by the woman's brother or brother's son, to the exclusion of her husband's heirs ... 262

SUDRAS.

1 The son of a *súdra* by a female slave will inherit, if there be no other heirs down to a daughter's son ... 15
2 According to the Hindu law, the illegitimate son of a *súdra* man by a female slave, or a female slave of his slave, may inherit, but not the illegitimate child of any of the three superior classes ... *ib.*
3 Among the *súdras*, the adoption of a sister's son and daughter's son, is valid ... 187
4 The son of a *súdra* by a concubine or female slave, is entitled to inherit property, but his widow is incompetent to aliene to the prejudice of other heirs ... 256

SURETY.

1 The estate of a deceased surety, is not liable for the debts of his principal: but *quere?* ... 285
2 Different descriptions of, enumerated ... *ib.*

TONSURE.

1 A boy may be adopted after tonsure by the natural father in the name of the adopter ... 181

UNCHASTITY.

1 An unchaste widow forfeits all right to her late husband's property 20
2 And may be expelled from his house ... 21
3 If the wife was turned away on account of unchastity, or similar offence, she has no right to be maintained ... 109
4 An unchaste widow is not entitled to maintenance from her husband's brother's, even though she may have resigned her right to his property in their favour, in consideration of such maintenance ... 112
5 An unchaste daughter is excluded from the inheritance ... 133
6 And the property will escheat, if there be no other heir ... *ib.*

UNCLES.

1 Failing the paternal grandmother, the paternal uncles succeed; but their property is divested, should the sister subsequently have male issue... ... 99

WIDOWS.

1 The heirs being three sons and a widow, (their mother,) each will take a fourth on partition ... 3
2 According to the law of Bengal, the heirs of three brothers, being respectively a son, a daughter's son, and a widow, they will each take a third 4
3 A widow succeeds to her husband's property, to the exclusion of his mother ... 18
4 In Bengal, a widow excludes a brother ... *ib.*
5 Distinction in the schools as to their right ... 19
6 Nature of her right ... *ib.*
7 An unchaste widow forfeits all right to her late husband's property... 20
8 And may be expelled from his house ... 21
9 Right of, according to the Benares school ... 22

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10 According to the law as current in Benares, the widow of an undivided brother has no right to her husband's property ... 23
11 Distribution of joint property, the claimant's being a father, brother, widow, daughter, and daughter's son ... *ib.*
12 Circumstances under which a widow excludes a brother ... 24
13 Distribution between a widow and her husband's brothers, the husband having died in the lifetime of his father ... 25
14 The claimants being a brother's son and a widow, the former will take the property, if the family was joint; but the latter if separate, according to the law of Benares ... 28
15 A widow cannot inherit property left by her husband's relatives or their widows ... 29
16 A widow is entitled to maintenance from her step-sons ... 31
17 Case in which the widows of two brothers inherit equal shares of property ... 32
18 A widow has no right to dispose of her husband's property, &c... 33
19 A man dying and leaving three widows who inherited his property, on the death of one of them without issue, the two others will take her share ... 37
20 And the succession would be the same, had the deceased widow left a daughter or daughters ... 38
21 A widow cannot give away her late husband's property to the prejudice of his heirs ... 48
22 The claimants to a joint estate being a widow, a son, and a brother, they will each take a third, to the exclusion of a daughter's son 79
23 An unchaste widow is not entitled to maintenance from her husband's brothers, even though she may have resigned her right to his property in their favour, in consideration of such maintenance ... 112
24 According to the law as current in Benares, the widow of a nephew is entitled to maintenance only from his uncles with whom he was in partnership ... 116
25 A widow whose husband died before his father has a legal claim to maintenance only ... *ib.*
26 The widow of a separated brother is not entitled to maintenance from her late husband's family ... 119
27 A widow cannot dispose of the whole estate which had devolved on her at her husband's death; and on the death of her daughter who succeeded her, it will go to her paternal grandfather's daughter's son, to the exclusion of her husband 123
28 Difference between the law of Bengal and of Benares relative to a widow's succession to her childless husband's estate, the former admitting it in all cases, whether the estate is divided or undivided, and the latter only in the case of a divided estate ... 192
29 A widow having a son may sue for her husband's property, if her son be a minor. ... 205
30 A widow may alienate a portion of her late husband's property for his spiritual welfare, or for her own subsistence. ... 211
31 But not for her own subsistence, if the next heir agree to support her. ... *ib.*
32 A widow may dispose of, by gift or otherwise, as she pleases, the property earned by her own exertions ... 240
33 A widow may, for the spiritual benefit of her deceased husband, make a gift of a small portion of his estate, to her own relation ... 244
34 The fact of a widow's having recovered her husband's share by litigation, gives her no additional power over it. ... 254
35 A widow cannot alienate, by gift or will, property devolved on her from her husband, nor her own acquisitions made by means of such property. ... 259
36 But she may dispose of her own peculiar property as she pleases, except such part of it as consists of *immoveable* property given to her by her *husband.* ... *ib.*
37 Circumstances under which the husband's heirs are liable for a debt contracted by his widow. ... 283

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38 Sale by a widow without the consent of the next heirs, of any part of the property devolved on her from her husband is invalid, except under special circumstances ... 299

WIFE.

1 When a wife manages her husband's affair, he is liable for the debts she contracts. ... 281

WOMAN'S PROPERTY.

1 A woman's property goes to her sons, to the exclusion of her grandson, whose father died before her ... 121
2 The estate of a woman does not, by her marriage, vest in her husband. 127

WRITINGS.

1 According to the Hindu law, a writing is merely used *in memoriam rei*, and a written instrument is not essential to the validity of any disposition of property. ... 147
2 A written instrument is not necessary to the validity of an adoption. ... 176

YAUTUCA.

1 Land purchased for a boy by means of his *Yautuca*, is not liable to partition. ... 159
2 Meaning of the term. ... *ib.*
3 A man may give his entire property to the husband of one of the daughters of his deceased son as a *Yautuca*, or nuptial present, to the exclusion of his son's widow and other daughters. ... 263

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